APPENDIX

In the Supreme Court of the United States

SUPREME COURT, U.S.
FILED
JAN 21 1972
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971

No. 71-81

UNITED STATES OF AMERICA, *Petitioner,*

v.

LOARN ANTHONY BISWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1971
CERTIORARI GRANTED DECEMBER 7, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-81

UNITED STATES OF AMERICA, *Petitioner*,

v.

LOARN ANTHONY BISWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Relevant docket entries	1
The indictment	3
Defendant's plea of not guilty	6
Defendant's motion to suppress evidence	7
Portions of the hearing on defendant's motion to suppress evidence	8
The court's order denying defendant's motion to suppress	12
Portions of the transcript of the trial	13
Order extending time to file petition for certiorari to July 17, 1971	63
Order granting certiorari *	64

---

* Opinion of the court of appeals appears as Appendix A to the petition for certiorari. The judgment of the court of appeals appears as Appendix B.

Relevant Docket Entries

Date 1970	Proceedings
Feb. 20	Filing Commissioner's papers consisting of Complaint, Warrant of Arrest, Order Specifying Methods and Conditions of Release (page 2 only), Appearance Bond in Amount of $20,000 with sureties, Affidavit for Search Warrant, Search Warrant, and Record of Proceedings.
March 2	Indictment returned and filed in open court at Albuquerque.
March 13	Albuquerque/Payne, J./Morrish, Rep. Defendant present and by retained counsel, Mr. Easley, government appearing by Mr. ReVeal. The Court explains the charge, possible penalty, and his rights. Right to trial in Roswell explained.
	ARRAIGNMENT: Plea of NOT GUILTY on Counts 1, 2, 3, 4, 5 and 6. Defendant elects to have trial in Roswell. Trial date not set. Bond continued. Conference of counsel to be had and omnibus report to be filed by March 23, 1970.
	Filing and entering Order Setting Conference of Counsel. Copies mailed to counsel as notice of entry.
April 24	Filing defendant's Motion to Dismiss.
	Filing defendant's Motion to Sever Counts and Elect.
	Filing defendant's Motion to Suppress.
	Albuquerque/Payne, J./Henry, Rep. Defendant is present and by retained counsel, Mr. Easley and Mr. Reynolds, government appearing by

Date 1970	Proceedings
	Mr. ReVeal. Defendant's motions are heard and argued, and following decisions announced: Motion to Suppress denied; Motion to Sever and Elect, Count 6 severed, government to elect which counts will proceed on; government to advise counsel and court by April 27. Motion to Dismiss denied. Counsel to prepare and submit appropriate orders.
May 4	Filing and entering Order denying defendant's motions to dismiss and to suppress, and denying defendant's motion to sever counts and elect, except that Count 6 is severed from the other counts (Payne).
	Notice of entry given to counsel by letter.
May 4	Roswell/Payne, J./Sid Morrish, acting reporter. Case is called for jury trial at 1:35 p.m. Defendant is present and by retained counsel, Mr. Easley and Mr. Reynolds, government appearing by Mr. Watkins and Mr. ReVeal. Jury selected and sworn. FIRST TRIAL DAY. Recess at 4:58 p.m.
May 5	At 9:08 a.m. SECOND TRIAL DAY. Juror Walker is excused because of illness in family and the alternate juror, Mr. Vidlar, takes his place. At 2:55 p.m. the jury retires to deliberate. At 5:37 p.m. the case is concluded with a VERDICT OF GUILTY ON COUNT 1 AND NOT GUILTY on COUNTS 2, 3, 4 and 5. The parties waive polling the Jury, and the Verdict is ordered received and filed. The Jury is discharged until May 25, 1970 at 9:00 a.m. Presentence report ordered. Sentence set May 25, 1970 at 9:00 a.m. at Roswell.
May 25	Roswell, Payne, J./Morrish, acting rep. Defendant present and by retained counsel, Mr. Easley, Government by Mr. Watkins. Allocution. Sentence:
	TWO (2) years imprisonment.
	Right to appeal explained. Defendant states he intends to appeal. Appeal bond set at $5,000.00.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*, vs. LOARN ANTHONY BISWELL, *Defendant*.	CRIMINAL No. 23978 26 USC 5861(a) and 5871 Failure to Pay Dealers Tax; 26 USC 5861(d) and 5871 Possession of Sawed-Off Rifle; 26 USC 5861(i) and 5871 Possession of Firearm Without Serial Number; 18 USC 922(m), 923(g) and 924(a) Failure to Maintain Records of Firearms and Ammunition

INDICTMENT

[Filed at Albuquerque, Mar. 2, 1970, E. E. Greeson, *Clerk*]

The Grand Jury charges:

COUNT I

On and before February 4, 1970, at Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, wilfully and knowingly engaged in business as a dealer in firearms, as defined by 26 USC 5845, that is to say, he was a person engaged in the business of selling firearms and accepting firearms as collateral for loans without having paid the special (occupational) tax required by 26 USC 5801 for his business.

In violation of 26 USC 5861(a) and 5871.

COUNT II

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, wilfully and knowingly did possess a firearm, as defined by 26 USC 5845(a), to wit, a weapon made from a rifle as modified having an overall length of less than 26 inches and a barrel of less than 16 inches in length, described as a Model X, Iver Johnson, single shot, bolt action, .22 caliber having an overall length of 24¼ inches and a barrel of 11¼ inches in

length, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Title II of the Gun Control Act of 1968, Public Law 90-618, 90th Congress.

In violation of 26 USC 5861(d) and 5871.

COUNT III

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully did possess a firearm, as defined by 26 USC 5845(a), to wit, a rifle having a barrel of less than 16 inches in length, described as a Model 33 Remington, single shot, bolt action, .22 caliber, with a barrel 15¾ inches in length, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Title II of the Gun Control Act of 1968, Public Law 90-618, 90th Congress.

In violation of 26 USC 5861(d) and 5871.

COUNT IV

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully, did possess a firearm, as defined by 26 USC 5845(a), to wit, a weapon made from a rifle as modified having an overall length of less than 26 inches and a barrel of less than 16 inches in length, described as a Model X, Iver Johnson, single shot, bolt action, .22 caliber having an overall length of 24¼ inches and a barrel of 11¾ inches in length, which was not identified by a serial number as required by 26 USC 5842.

In violation of 26 USC 5861(i) and 5871.

COUNT V

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully, did possess a firearm, as defined by 26 USC 5845(a), to wit, a rifle having a barrel of less than 16 inches in length, described as a Model 33 Remington, single shot, bolt

action, .22 caliber, with a barrel 15¾ inches in length, which was not identified by a serial number as required by 26 USC 5842.

In violation of 26 USC 5861(i) and 5871.

COUNT VI

On or about February 4, 1970, at Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, a licensed dealer in firearms, as defined in 18 USC 921, did knowingly and wilfully fail to properly maintain records which he was required to keep pursuant to 18 USC 923 and regulations promulgated thereunder, that is to say, he did fail to maintain records of the receipt, sale, or other disposition of firearms and ammunition at such place, for such period, and in such form as the Secretary of the Treasury has by regulations prescribed.

In violation of 18 USC 922(m), 923(g), and 924(a).

A TRUE BILL

/s/ Lance M. Harvey
Foreman of the Grand Jury

VICTOR R. ORTEGA
United States Attorney

/s/ Ruth C. Streeter
RUTH C. STREETER
Assistant U. S. Attorney

How do you plead as to count one, guilty or not guilty.

MR. BISWELL: Not guilty.

THE COURT: All right. How do you plead as to count two, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead to count three, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead to count four, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead as to count five, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead as to count six, guilty or not guilty?

MR. BISWELL: Not guilty.

Motion to Suppress Evidence

[Filed at Albuquerque, Apr. 24, 1970, E. E. Greeson, *Clerk*]

1.

Defendant moves to suppress as evidence the two 22-calibre rifles as described in Counts I, II, III, IV and V and any of defendant's records involving same for the reason that they were obtained by an illegal search and seizure in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States.

2.

Defendant moves to suppress as evidence all guns and records belonging to defendant obtained by the Government under the alleged search warrant dated the 5th day of February, 1970, for the reason that the guns and records were obtained by an unreasonable and illegal search and seizure in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States.

Easley & Reynolds

By Mack Easley
Attorneys for Defendant
Box 638
Hobbs, New Mexico

THE COURT: I will call up United States of America versus Loarn Anthony Biswell.

* * *

THE COURT: You may call your next witness.

MR. EASLEY: If the Court please, that testimony goes to our—well, we can identify it later, but I would like to call Mr. Tom Hupp at this time. If the Court please, to orient the Court, this will have to do with the search and seizure and we will try and keep it——

THE COURT: Okay.

MR. EASLEY: —— brief.

THOMAS HUPP

was called as a witness herein on behalf of the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. EASLEY:

Q. Will you state your name, please?

A. My name is Thomas Hupp. I am a special investigator with the Alcohol, Tobacco and Firearms Division of the Treasury Department.

Q. And you are stationed——

A. El Paso, Texas.

Q. How long have you been with that department, Mr. Hupp?

A. A little over three years.

Q. Did you make an inspection of Mr. Tony Biswell's place of business in Hobbs, along about February 2nd, or thereabouts?

A. February 4th, 1970.

Q. February 4th. Was that your first trip there?

A. That was my first trip there, yes, sir.

Q. What was the purpose of your visit?

A. Routine compliance investigation in regard to his firearms records.

Q. And did you check with him about the records?

A. I did, sir.

Q. And what did you obtain? State to the Court just what you did, if you will, and what happened there.

A. Upon entering the premises, Your Honor, I identified myself and explained the purpose of the investigation, which was a routine compliance investigation with regard to the firearms records and firearms and ammunition records as regards to the acquisition and disposition of both.

Q. What did Mr. Biswell say to you about his records?

A. Well, I asked him for his firearms records and he produced a book, which did not contain the proper information and it was not in proper form. Also I requested the ammunition record, work acquisition and disposition, and he stated he did not have that and would not have that.

Q. What else was said at that time, if you recall, as far as Mr. Biswell is concerned?

A. Well, I displayed to him a copy and presented him a copy of Commerce and Firearms, Ammunition, Six Twenty-Six, and Gun Control Act of 1968, Six Twenty-Seven, and asked him if he had not received a Commerce of Firearms in the mail and he stated that he probably did, that he had received a lot of things in the mail and didn't have time to fool with them.

Q. Now did you have a search warrant at that time?

A. Negative. I did not.

Q. Was there anything said about a search warrant?

A. When I had finished our explaining the recordkeeping requirements and so forth, at that time I stated to Mr. Biswell that I wanted to check the rest of the premises in regard to the firearms that were on the premises and he stated that he didn't want me to go in the back room. At that time, I displayed to him my—the authorization in the Gun Control Act of 1968, which allows us acquisition and entry into the licensed premises, which includes places of storage. After he read that part, why, he said, "Well, that's what it says so I guess it's okay."

Q. Did he tell you what type of guns he had stored in the back?

A. Yes, sir, he told me he had pawn items and weapons in lay-a-way.

Q. Now, did you go into the back?

A. Yes, sir, I did.

Q. And did you discover anything back there of any interest to you?

A. Yes, sir. Immediately upon going to the back, and

as you go into his storeroom on the right-hand side, there is another door, open doorway, and along that wall which runs east and west, I believe, there was a number of firearms leaning against the wall and foremost in that stack of firearms I noticed a short-barreled rifle.

Q. Now, one or two?

A. I saw the one first and I picked it up and examined it and saw that it was, indeed, a sawed-off rifle and at that time I advised Mr. Biswell of his rights as listed in document fifty-six sixty-one.

Q. Where did you locate the other short-barrel rifle?

A. It was in close proximity to that. I believe along that same stack, sir.

Q. State to the Court whether or not they were in plain view there as you walked into the room?

A. Not as you walked directly into the storeroom, but when you walk into that portion, you walk back into the storeroom and then turn right through the open doorway and they were in plain sight, right.

Q. They were stacked right along with all of the other guns against the wall?

A. You bet they were.

Q. Now after you—what did you do after that? Did you go ahead and check his records, the balance of his records?

A. Well, he didn't have any records.

Q. How long were you in there?

A. Approximately an hour and fifty minutes. I believe I arrived about three-ten p.m. and departed about five p.m.

Q. And did you take those two short-barrel rifles?

A. I did.

Q. When did you arrest Mr. Biswell?

A. I arrested Mr. Biswell about ten twenty-five a.m. on February 5th.

Q. That was the next day after you made this investigation?

A. That's correct.

Q. You later obtained a search warrant as to the other guns that were seized?

A. I did.

Q. And when did you search the premises and seize those guns?

A. We arrived on the premises at approximately five-twenty p.m. on February 5th and departed at two-twenty a.m. February 6th.

MR. EASLEY: I believe that's all, if the Court please.
THE COURT: All right, you may cross examine.
MR. REVEAL: We have no questions.

ORDER

[Filed at Roswell, May 4, 1970, E. E. Greeson, *Clerk*]

The motions of defendant came on for hearing in open court on April 24, 1970, the defendant appearing in person and by his attorneys, Mack Easley and Warren F. Reynolds, and the United States of America appearing by its attorneys, Victor R. Ortega, United States Attorney, and Stephen L. ReVeal and Michael P. Watkins, Assistant United States Attorneys, the Court having heard the evidence and the arguments of counsel, and the Court being fully advised in the premises, it is therefore

ORDERED that defendant's motion to dismiss be, and it hereby is denied.

IT IS FURTHER ORDERED that defendant's motion to suppress evidence be, and it hereby is, denied.

IT IS FURTHER ORDERED that defendant's motion to sever counts and elect be, and it hereby is denied, excepting that Count 6 of the indictment herein be, and it hereby is severed for trial from the other counts of the indictment and a separate trial shall be held on Count 6 of the indictment and a separate trial shall be had on all the remaining counts of the indictment. Trial on counts 1, 2, 3, 4, and 5 of the indictment will be had in Roswell, New Mexico, on May 4, 1970, at 9:00 a.m. A setting of the trial on Count 6 of the indictment will be made in the future.

/s/ H. Vearle Payne
United States District Judge

APPROVED:

/s/ Stephen L. ReVeal
STEPHEN L. REVEAL
Assistant U. S. Attorney

/s/ Mack Easley
Attorney for Defendant

[63] WILBUR SNYDER

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[67] Q. (Mr. ReVeal continuing.) During the course of your knowing Mr. Biswell, have you ever conducted any pawn business with him?

A. Yes, sir.

Q. In particular, have you ever pawned any firearms?

A. Yes, sir.

Q. I will hand you what has been marked as Plaintiff's Exhibit Number One, and ask you if you have ever seen that before?

A. Yes.

Q. And where have you seen that exhibit before?

A. I pawned it.

Q. You pawned that to Tony?

A. Yes, sir.

Q. Is that your weapon or was that your weapon when you pawned it?

A. Yes, sir.

Q. When did you pawn that to Mr. Biswell?

A. Approximately in February.

Q. Of this year?

[68] A. Yes, sir.

Q. Do you recall approximately how much you received?

A. I think about three dollars.

Q. And you pawned it? Where did you pawn this?

A. At Tony's Pawn and Loans.

Q. In Hobbs, New Mexico?

A. Yes.

Q. And with whom were you dealing?

A. Tony.

Q. Mr. Biswell, himself?

A. Yes, sir.

Q. Did you have any conversation with Mr. Biswell at that time about the particular weapon at the time you pawned it?

A. No, sir.

Q. Is that in essentially the same condition today that it was when you pawned it?

A. Yes, sir.

Q. Same length, to the best of your knowledge?

A. Yes, sir.

Q. Was it that length when it came into your possession?

A. Yes, sir.

[69] Q. About what time of day was it that you pawned it to Mr. Biswell?

A. It was close, as I can remember, it was about seven o'clock in the evening. He was getting ready to close up.

Q. When you went in, was the store open?

A. Pardon me?

Q. Was—when you went into the shop, was the store open?

A. Yes, sir.

Q. Was anyone in there besides you and Mr. Biswell?

A. Yes, sir.

Q. Where—were these customers or were they other employees?

A. Some of both, most of them were customers.

Q. I will hand you what has been marked as Plaintiff's Exhibit Two and ask if you have ever seen this before?

A. Yes, sir.

Q. Where have you seen that before?

A. That is the receipt that Tony gave me for the rifle when I pawned it.

Q. Is that the receipt that Tony Biswell gave you for that rifle, is that correct?

* * * *

[71] CROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Snyder, was this the first time that you pawned any guns with Tony?

A. No, sir.

Q. Do you have a collection of guns, yourself?

A. Yes, sir.

Q. How many guns do you have?

A. I believe I have four now.

Q. Four?

A. Un-huh.

Q. Are any of those other guns short weapons, have sawed-off barrels?

A. No, sir.

Q. How many times would you say that you dealt with Tony as far as pawning those guns is concerned? That is, in the past two and a half years.

A. Probably a half a dozen or a dozen times.

[72] Q. And does he have all of the rest of your guns at this time under pawn?

A. All but one.

Q. And when did you get it out?

A. Day before yesterday, I believe it was.

Q. Where did you get this gun, if you know?

MR. REVEAL: Your Honor, we will object to this as being irrelevant to the issues of this case.

THE COURT: Yes, what is the purpose of this, counselor?

MR. EASLEY: If the Court please, I guess I can withdraw and accede to the objection.

THE COURT: All right.

Q. (Mr. Easley continuing.) When you normally go in to pawn your guns, are there usually a lot of people around there?

A. Yes, sir.

Q. Usually there are several people around the counter talking with Tony and working with him on pawns for sale?

A. Yes, sir.

Q. And on this particular occasion when you walked in with this gun, or rifle, you were saying there were several people in there. Would you care to estimate for the jury how many?

[73] A. Well, I would imagine a half a dozen people.

Q. Were they up around the counter?

A. Some of them, yes.

Q. Now, you have dealt with Tony before on these pawns, when you brought this gun up to him and told him that you wanted to pawn it, did he deal any different as far as this gun was concerned that he did with the others?

A. No, sir.

Q. Did he attempt to sneak around behind the counter in order to hide it or anything?

A. No, sir.

Q. Did he say anything to you about this is an illegal gun? Or that he couldn't take it?

A. No, sir.

Q. He just made out the pawn ticket and handed you the money like he normally does?

A. Yes, sir.

Q. Now, when did you decide to go back for the gun, if you did?

A. Well, I was planning on going back to get it the following payday.

Q. And did you have a chance to get it?

A. No, sir.

Q. Was the time of the pawn up?

A. No, sir.

[74] Q. For what length of time was it pawned?

A. I don't remember for sure, but it wasn't very long.

Q. I am wondering as far as the pawn ticket, was it pawned for thirty days or sixty days or what? What was the period of time for which you put it in there?

A. It was pawned for thirty days.

Q. But that thirty days had not elapsed at the time that the gun was seized?

A. No, sir.

MR. EASLEY: No more questions.

MR. REVEAL: No redirect, Your Honor.

THE COURT: All right, you may step down.

(THEREUPON, the witness was excused.)

THE COURT: Now, don't discuss your testimony with anyone else.

MR. REVEAL: Call Ralph Sias.

RALPH SIAS

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[76] Q. And how did you come to know Mr. Biswell?

A. He is the owner of the pawn shop.

Q. Would that be Tony's Pawn and Loans?

A. Yes, sir.

Q. Have you ever pawned any material, any items, through Mr. Biswell?

A. Yes.

Q. On about how many occasions?

A. About three.

Q. Have you even pawned any firearms to Mr. Biswell?
[77] A. Yes, sir, I mean I haven't pawned any, I didn't pawn any, just that gun over there.

Q. Let me hand you what has been marked Plaintiff's Exhibit Number Three and ask you if you have ever seen that before?

Would you point that up in the air, please? It is unloaded, but keep it up anyway.

A. Yes, sir.

Q. Where have you seen that before, Mr. Sias?

A. I pawned it.

Q. And to whom did you pawn it?

A. Tony.

Q. Do you recall about when that was?

A. It was around December or January.

Q. And would that be December of 1969 or January of 1970?

A. Uh-huh.

Q. Can you be any more specific than that, get a closer date than that for us?

A. No, sir.

Q. Do you recall at about what time of day this was?

A. Oh, it was about three o'clock.

Q. Would that be in the afternoon or in the morning.
[78] A. In the afternoon.

Q. And where did you pawn it?

A. Over at Tonys.

Q. Was it at his home or pawn shop?

A. At the pawn shop.

Q. When you went into the pawn shop, was there anybody else there?

A. I don't remember.

Q. Now, who did you deal with when you went in there?

A. Tony.

Q. Mr. Biswell, himself?

A. Yes.

Q. Did you discuss that weapon with him at all at the time you pawned it?

A. No, I didn't.

Q. Do you recall how much you got for it?

A. Three dollars.

Q. Do you recall seeing anybody else in the store besides yourself and Mr. Biswell?

A. Just the employees were there.

Q. Do you recall seeing any customers there?

A. No, I don't remember.

Q. Was the store open at that time when you went in there?

[79] A. Yes.

Q. It wasn't on a Sunday or anything like that?

A. No, it was during the week.

Q. Now, take a good look at that rifle, Mr. Sias. Is that in essentially the same condition today as it was the day you pawned it?

A. I don't remember if it is or isn't.

Q. Well, does it look like it has been altered in any fashion?

A. No.

* * * * *

Q. (Mr. ReVeal continuing.) Mr. Sias, did you ever redeem this from the pawn shop?

A. Sir?

Q. Did you ever get it back?

A. No, sir.

Q. Did you ever pay off the pawn?

A. No, sir.

[80] Q. How long did you pawn it for?

A. It was around a month. And I went over there to get it and they said the gun was already gone, that both—all of this gun was gone and that is the reason I didn't get it out.

* * * *

CROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Sias, what did you pay for that gun?

A. Three dollars—I mean two-fifty.

Q. And Tony gave you three dollars on the pawn?

A. Yes.

Q. You say that it was about three o'clock in the afternoon when you went in his place of business. Do you recall if there were any customers in there at the time.

A. No, I didn't look around. I just saw the employees that worked there.

Q. Are you in his place quite often?

A. Yes.

Q. Are you aware that he keeps his place open [81] from eight in the morning until seven in the night?

A. Yes.

Q. How often do you go in there?

A. I don't go in very often, just once in a while.

Q. Do you go in and buy things there at Tonys?

A. Yeah, I bought a radio from him.

Q. Normally, when you are in there, are there a lot of customers around?

A. Yes.

Q. Now, I believe you stated that you went over to pick up the gun. Did you intend to take it out of pawn and it had been seized?

A. Yeah.

MR. EASLEY: That's all.

* * * *

[82] RECROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Sias, you didn't know that that gun was an illegal gun, did you?

A. No, sir.

Q. At the time you went in and showed it to Tony, did he say anything about it being illegal?

A. No, sir.

Q. Did he attempt to conceal it in any way?

A. No, sir.

Q. Did he handle that gun like the way that he handles other pawns that you had made there?

A. Yes, sir.

[83] THOMAS G. HUPP

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[84] Q. And by whom are you employed?

A. Alcohol, Tobacco and Firearms Division of the U.S. Treasury Department, Internal Revenue.

Q. And where do you live?

A. El Paso, Texas.

Q. Is part of the area that you cover in your capacity of the Alcohol, Tobacco and Firearms Division, did it encompass the county?

A. Yes, it does.

Q. That is Lea County, New Mexico?

A. Yes, sir.

Q. What actually is your position with the division?

A. I am a special investigator.

Q. And as such, what are your duties?

A. I am responsible for enforcing internal revenue codes and laws pertaining to the Alcohol, Tobacco and Firearms as spelled out in the Gun Control Act of 1968.

Q. Did you have occasion on February 4, 1970, to come to Hobbs, New Mexico?

A. Yes, I did.

Q. What was the purpose of your visit to Hobbs?

A. A routine compliance investigation of firearms [85] dealers.

Q. Did you on that day, did you have occasion to go to Mr. Biswell's place of business?

A. Yes, sir.

Q. And where is that located?

A. On West Marlin Street, Hobbs, New Mexico.

Q. Do you recall the name of the place of business?

A. Tonys Pawn and Loans.

Q. About what time of day did you go there?

A. About three-ten p.m.

Q. Did you go by yourself?

A. No, sir, I was accompanied by Mr. Bill Fowler of the Hobbs Police Department.

Q. And what was your purpose of going to Mr. Biswell's place of business?

A. To conduct a routine compliance investigation.

Q. What happened after you arrived there?

A. After identifying myself to Mr. Biswell, and explaining certain requirements, I discovered two illegal firearms on the premises.

* * * * *

[86] Q. (Mr. ReVeal continuing.) When you went into Mr. Biswell's place of business with Mr. Fowler, were there other people there as well as Mr. Biswell?

A. Yes, sir, there were.

Q. What is your best estimate of the number of people that were there?

A. Oh, from five to ten.

Q. Did it vary in the time that you were there?

A. Yes, sir, it did.

Q. How long did you stay there?

A. Approximately an hour and fifty minutes.

Q. And during the time you were in that place of business, were you conversing with Mr. Biswell the entire time?

A. No, I wasn't. I attempted to converse with Mr. Biswell, but he would interrupt our conversation to wait on customers.

Q. How often did this happen?

A. Numerous times.

Q. Well, did you spend more time talking to him or waiting for him?

A. More time waiting.

Q. Now, I believe you said you found a couple of rifles there? How did you happen to come across these [87] rifles

A. I was checking the stock to see if there were any illegal firearms there.

Q. Where did you go to check his stock?

A. The storerooms.

Q. Was this part of this same building that the store was in?

A. Yes, sir, it is.

Q. And which store would you go into when you found the rifles in question?

A. The building is split up primarily into four rooms. The front of the building is one long room. And directly north of the east part of the building, there is a storeroom, and you enter it from the storeroom that borders on the west part of the building.

As you enter that doorway there is an open doorway to the right which gives you access to the storeroom directly behind the front east part of the building. And the firearms were leaning against the wall of that storeroom.

Q. And were the contents of this room identified to you?

A. Yes, they were.

Q. And by whom were they identified to you?

A. By Mr. Biswell.

[88] Q. And, Tom, what did he say about the contents of this room?

A. He said that the firearms and weapons were on pawn.

Q. I will hand you Plaintiff's Exhibit Number One, and ask if you have ever seen this before?

A. Yes, sir, I have.

Q. And where did you see that before?

A. In the storeroom that I described as the premises of Tonys Pawn and Loans.

Q. How did you come to find that particular weapon?

A. This was about the first firearm that I noticed there, standing out by its obviously illegal status.

Q. What do you mean by that?

A. Well, sir, obviously it has a barrel of less than sixteen inches and the overall length is obviously less than twenty-six.

Q. Twenty-six inches?

A. Yes, sir.

Q. Did you measure that barrel and rifle?

A. Yes, I did.

Q. When did you do that?

A. Upon spotting the weapon, I picked it up and measured the barrel.

[89] Q. And what is the length of the barrel of that weapon?

A. Eleven and three-quarter inches.

Q. What is the length of the entire weapon?

A. Twenty-four and one-quarter inches.

Q. Now, is that rifle essentially in the same condition today as when you saw it at the store?

A. Yes, it is. The bolt was in place on the weapon, and, of course, it didn't have no evidence tag.

Q. When was the evidence tag placed on it?

A. After I had removed it from the premises.

Q. On the same day?

A. Yes, sir.

Q. Have you had occasion to attempt to fire that weapon?

A. Yes, sir, I test-fired this weapon that afternoon.

Q. And where was that accomplished?

A. At Hobbs, New Mexico.

Q. And what was the result?

A. I found it to be fully operable.

Q. How do you test it?

A. I fired it.

Q. Put a shell into it and fired it?

A. Yes, I did.

[90] Q. And it functioned properly?

A. Yes, it did.

Q. Now, I will hand you Plaintiff's Exhibit Three and ask you if you have ever seen that before?

A. Yes, I have.

Q. And where did you see that?

A. At the premises of Tonys Pawn and Loans.

Q. And where was it at when you saw it there?

A. It was leaning against the same wall in the general vicinity of the first firearm.

Q. And when did you see it there?

A. Shortly after discovering the first weapon.

Q. It would have been the same day?

A. Yes, sir.

Q. About the same time?

A. Yes, within minutes.

Q. Have you had occasion to measure the barrel on this weapon?

A. Yes, I measured the barrel on the weapon.

Q. And what is the length of the barrel of the weapon?

A. Fifteen and three-quarters inches.

Q. Now, Mr. Hupp, how do you measure the barrel of a weapon?

A. From the face of the bolt to the end of the [91] barrel.

Q. This is the method you used when you measured these?

A. No, sir, I couldn't find—or didn't have with me a cleaning rod. So, I had to sight along here (indicating) and I am sure that I am accurate within a millimeter of the length of the barrel.

I had to place the tape at the end of the barrel and bring it down here (indicating) where you can see that the face of the chamber comes very close to the end of the front part of the receiver.

Q. Now, was that rifle in essentially the same condition today as it was when you saw it at Tonys Pawn and Loans?

A. Yes, sir, except for the removal of the bolt.

Q. Was the bolt in or out?

A. The bolt was in the weapon.

Q. Did you have occasion to test-fire that weapon?

A. Yes, sir, I did.

Q. And when did you do that?

A. At the same time or the same afternoon that I test-fired the first weapon, on February 4th.

Q. And how did you test it?

[92] A. By firing it, placing a .22 caliber cartridge in and firing it.

Q. Did it function properly?

A. Yes, it did.

Q. Did you, while you were at Mr. Biswell's place of business, ask him if he had a dealer's license for the National Firearm's Act, for weapons?

A. Yes, I did.

Q. What was his response then to that?

A. He said that he did not.

Q. That he what?

A. Did not.

Q. Did he make any effort to locate a license at his place of business, a license for a National Firearms Act, for weapons, such as the one you have in your hand?

A. Well, I looked for a license when I first entered and I had to ask Mr. Biswell for the Federal Firearms license. He did not have it prominently displayed.

Q. What is the difference between the Federal Firearms license and the National Firearms Act license?

A. The Federal Firearms license is a license that all dealers must have in order to sell legal weapons, as we all know them. Generally, a sporting weapon, shotguns, rifles, and all legal barrel lengths, and also ammunition.

[93] National Firearms Act license costs considerably more. It costs two hundred dollars a year and is for dealers of sawed-off shotguns, and rifles having barrels less than sixteen inches, and machine guns, and gangster-type weapons.

Q. Well, now, while you were there at Mr. Biswell's place of business, did you discuss the requirements of the law and the regulations with respect to these weapons?

A. I did.

Q. Did you give him any copies of these regulations and statutes?

A. I gave Mr. Biswell a copy of the Gun Control Act of 1968, which is a Publication 627, which has all of the firearm laws of the Gun Control Act of 1968 there in them.

Q. Did you have occasion to return to Mr. Biswell's place of business the following day?

A. Yes, I did.

Q. On—going back to the first day—before did you give him a copy of these regulations that day?

A. Yes, I did.

Q. And a copy of the statutes as well?

A. Yes, I did.

Q. When you returned to Mr. Biswell's place of [94] business on the fifth of February, about what time of day was that?

A. It was about five-twenty p.m.

Q. Did you, at that time, see the document which you had given to Mr. Biswell on the fourth?

A. Yes, I did.

Q. Did you see any other copies of the rules and regulations or statutes with regard to the National Firearms, weapons at that place of business, in addition to the ones you gave him?

A. I saw a copy of Publication 626, Commerce, Firearms, and Ammunition, that was on the premises, other than the ones I had given him.

Q. And what is document 626, what are you talking about there?

A. It is a booklet describing to the dealers what is required and how to keep their records under the Federal Firearms Act.

Q. Did you see these two weapons there that we are talking about on the fourth?

A. Yes, I did, on the fourth.

Q. Did you discuss with Mr. Biswell at all the status of those two weapons, Plaintiff's Exhibit One and Three?

A. Yes, I did.

[95] Q. Why did you do that?

A. Immediately upon spotting the first firearm, after seeing it was an illegal weapon, I then asked Mr. Biswell if it was registered.

Q. What do you mean "was it registered?"

A. Well, gangster type weapons have to be registered

with the National Firearms Registration and Transfer Record for this type of weapon.

Mr. Biswell stated it wasn't.

Q. I am sorry. I missed your last words.

A. Mr. Biswell stated that it was not registered as far as he knew, I believe was his statement.

Q. Now, did you have occasion to discuss the second weapon, I believe that is Plaintiff's Exhibit Three, the second one you found?

A. Yes, I did.

Q. And when did that discussion with Mr. Biswell take place?

A. Shortly after, within minutes, of the first discussion.

Q. Right after you found it?

A. Yes, sir.

Q. What was that discussion?

A. Essentially the same. I advised him that this was also an illegal weapon. It fell into the same [96] category as the first. And that it would also be seized.

Q. Did you ask him whether it had been registered?

A. Yes, I did.

Q. What was his response to that?

A. He said as far as he knew, it was not registered.

MR. RE VEAL: That's all, your witness.

CROSS EXAMINATION

Q. What territory does your district encompass at this time?

[97] A. The seven southern counties of New Mexico and the nineteen western counties of Texas.

Q. How many agents do you have there to work with you?

A. One other agent.

Q. How many dealers do you have in these counties, if you recall?

A. I don't recall the exact number. We are getting more dealers all the time. It approaches fifteen hundred.

Q. Now, about how often do you get around to seeing these dealers, or some agent?

A. We try to contact each dealer once a year.

Q. Have you ever been in Tony Biswell's place of business before?

A. No, I hadn't.

* * * * *

[98] Q. (Mr. Easley continuing.) Now, you are saying there are two different types of guns, the regular ones that are legal to be sold, and then the gangster-type guns, you called them. Now, are these the gangster-type guns you are talking about here?

A. Well, sir, I didn't determine it was a gangster-type weapon, Congress determined the gangster-type weapons. It falls in that category.

Q. And in order to get a license to handle these, it would be necessary that the dealer pay an additional license fee of how much?

A. Of two hundred dollars a year.

Q. Is it also necessary for them to pay two hundred dollars every time one of these guns is transferred?

A. Now, it is. It is incumbent upon the transferrer to pay a two-hundred-dollar tax with each firearm.

Q. In other words, now, when Mr. Snyder brought that short gun in there, he was held under the law to pay [99] two hundred dollars just to transfer this to Tony Biswell on a pawn?

A. If one individual transfers this type of weapon to another, it is incumbent upon the transferrer to pay the tax.

* * * *

Q. Now, you say these are—you referred to them as gangster-type weapons. Aren't these types of .22's [100] in your experience, sometimes sawed-off so that it's—so that kids can use them to shoot with?

A. In my experience, no, sir.

Q. Now, you say that you were in Hobbs to make a routine compliance check of these dealers in our city there, you checked several of these dealers before you went to Tony's Pawn Shop, did you not?

A. Not several.

Q. How many would you say?

A. One other dealer that day.

Q. And you were checking to see whether or not he was entitled to have his license renewed?

A. Would you—

Q. One of the purposes was to—for his license renewal?

A. Well, when we contact a dealer, we have three forms to fill out, 4314, 15, 16, 17.

The 4317 has to do with renewal of licenses. We have background investigations to make, to make sure that none of these people have ever had any problems, convictions, and so forth.

Q. Now, did you at that time, after you had been there a while, look at some of his guns out in front, you told him you wanted to go back in the storage room?

[101] A. That's right.

Q. And at that time, he told you that those guns in the storage room were pawned guns?

A. No. When we went back into the storage room, he indicated a group of firearms that he told me were on lay-a-way and had certain amounts of money paid on them. And that the other firearms, I believe, in two different places, were pawned items.

Q. But, isn't it true, Mr. Hupp, that he told you before you went back into the back room that he had the pawned guns stored there?

A. I don't recall if he told me that before we went back there or not.

[101] Q. Did he ask you if you had a search warrant?

A. Yes, he did.

Q. And what was your response to that?

A. I said, "No, I didn't have a search warrant." And that the license premises is open to inspection during normal business hours.

Q. And what then was his response?

A. He asked to see the section of the law. And I showed it to him. And he said, "Well, that is what the law says," and so he said okay.

Q. So you walked back into the storage room and isn't there a sign on the door going back into that [102] back storage place, "No admittance, employees only"?

Do you recall?

A. Yes, I believe there is such a sign.

• • • •

[103] Q. And where, when you walked into that room, did you see that short gun?

A. Approximately in this area (indicating).

Q. It was inside of the door where these guns are indicated here?

A. That is correct.

Q. And I believe you stated that that was the first weapon that caught your view when you stepped in there?

A. No, I didn't say the first weapon that caught my view. I said that it stood out in an obvious illegal capacity.

Q. It wasn't covered up in any way?

A. Not at—not that I can recall.

[104] Q. It wasn't concealed or wrapped up in any manner that you couldn't immediately see it?

A. No, it was obvious.

Q. Now, where was the other gun you are talking about?

A. It was in the same line, general area, as the first.

Q. Right close to it?

A. Close by it, close proximity to the first one.

Q. And now, you say the minute you saw that, you picked it up and looked at it?

A. That is correct.

* * * *

Q. And what else occurred at that time?

A. Well, I asked him, as I stated prior to this, if the firearms were registered, or the first firearm was registered.

Q. And then you went down and located the other firearm and went through the same routine?

A. No, I didn't advise Mr. Biswell of his rights [105] on the second firearm. I had already advised him of his rights.

Q. But you say, "Now, do you have this gun registered with the National Firearms Registration and Transfer Record?"

A. I asked him if the firearm was registered to him. And he said that as far as he knew it wasn't, that he didn't know anything about the registration procedures.

I explained to him that we had had an amnesty period in November of 1968, whereby anybody possessing any types of these weapons could have them registered with no possibility of criminal prosecution.

Q. That amnesty period is over now, is it not?

A. It is.

Q. So any person who possesses firearms such as that is guilty under the Act?

A. Mere possession constitutes, or is the charge.

Q. Now, when you picked these guns up, you told him you were seizing them?

A. I advised him of their illegal status and told him that they would be seized.

Q. And you didn't have any intention of leaving them there, I would judge?

[106] A. No, I didn't.

Q. And he had asked you—if he would have said to you, "Now, these guns are pawned and belong to someone else, and not to us, and I don't want you to take them," you would have taken them anyway?

A. Yes, I would have.

[106] Q. Did you ask him who these belonged to?

A. Yes, I did. On the shortest firearm, he looked up and presented a pawn slip with the name of Wilbur Snyder.

And on the second firearm, he couldn't come up with a pawn slip. He stated—he also stated that he couldn't read this name on here. And there is a name on this piece of paper which was on the firearm at that time. And the name of Ralph Sias can barely be made out.

And I believe at that time, if my memory serves me, Detective Fowler looked at this name and asked him if it was Ralph Sias. And if my memory serves me, I believe Mr. Biswell said, "Yes", that was correct. He believed it was Ralph Sias.

Q. And did you look at them for serial numbers?

A. Yes, I did.

Q. And did you say anything to Mr. Biswell at that time as to whether or not he should have had these [107] serial numbers designated by the Secretary of Treasury or his delegate?

A. When I explained the process of the prior registration and so forth, I pointed out to him that these firearms also had to be identified by a serial number.

Q. Now, when did this occur?

A. Just—during the explanation period. Mr. Biswell had made inquiries and I explained to him the illegal status of the firearms and told him the different things that you—that a firearm had to be identified by serial number and the barrel length could not be less than sixteen inches on a rifle, and eighteen inches on a shotgun.

Q. And you say this was all done at the same time you picked these guns out of this row of guns in the vault?

A. No, not at the same time. After I advised him of his rights. He had asked several questions and I explained them to him.

Q. This was after you had actually seized the rifles?

A. That is correct.

* * * *

[108] Q. Now, as far as these indictments are concerned, they are based, are they not—for these—four of these—on the fact that there were no serial numbers assigned by the Secretary of the Treasury or his delegate.

And on the fact that these two guns were not registered with the National Firearms Registration and Transfer Record, were they not?

A. That is more or less correct. The possession of firearms, they are not registered to the possessor, and possession of a firearm not with an assigned serial number are separate counts.

Q. So these two things were very important to you at that time, I judge?

A. Pardon?

Q. These violations were important to you at that time?

A. Well, any violation that is discovered is important. The fact that the firearms were not registered to Mr. Biswell was paramount, of course, in importance.

Q. Now, in this report that you made to the U.S. District Attorney, did you make any reference in that [109] report to saying something to Tony Biswell before you seized these guns, or at the time you seized these guns, that they were not registered—or asked him if they were registered?

A. I don't recall. I have my statement here. I can refer to it.

Okay, what was your question, sir?

Q. The question is, did you say—put anything in your statement there to the effect that you had asked Tony Biswell if these guns were registered?

A. No, I don't have it in the statement.

Q. Now, you made a supplemental statement, did you not?

A. Yes, I did.

Q. Would you check that and see if you advised the U.S. Attorney that you made a statement to Mr. Biswell, asking Mr. Biswell whether or not these guns were registered?

A. No, not in the statement.

* * * *

[112] Q. (Mr. Easley continuing.) Mr. Hupp, the indictment here covers the question of the absence of serial numbers from these guns.

Did you find that both of these guns did not have serial numbers?

A. Yes, I did.

Q. In your experience with guns, will you state to the jury whether or not these two guns had serial numbers to begin with?

A. They did not have serial numbers when they were originally manufactured. However, when these firearms were altered into their illegal status, at that time, serial numbers would have been assigned had they been manufactured legally.

Q. And two counts in this indictment have to do with the defendant's failing to obtain serial numbers on these?

A. If you will read that indictment to me. I don't have that completely in my mind.

Q. I will withdraw that, if Your Honor please, I believe that has been stated to the jury.

Now, Mr. Hupp, will you check your report to [113] the United States District Attorney and see if you stated in that report anything regarding a conversation with Tony Biswell as to whether or not he had applied for serial numbers?

A. I don't think my report reflects whether or not I asked him if the weapons had serial numbers.

Q. And is your second, supplemental report, are you saying that it did not contain anything about an inquiry as to serial numbers?

A. Yes, it did not. However, in the normal function of the reports, we have a form 2370 that is forwarded to the national office and also a copy of which is forwarded to the United States Attorney where it describes the weapons and describes it as not having a serial number.

Q. Now, so that the jury won't be confused at all, after your last statement, you made no mention to the United States Attorney about inquiring about this to Tony Biswell?

A. No, either of my two statements to the United States Attorney did I mention that.

Q. Now, I will ask, do you have any recollection of talking with me sometime, let's say, about three weeks ago over the telephone?

A. Yes, I do.

[114] Q. Did you make any notes on that conversation?

A. No, I didn't. Do you have a tape of that telephone conversation?

MR. EASLEY: If the Court please, I do not have a tape.

Q. (Mr. Easley continuing.) Do you recall the gist of the conversation that we had?

A. You asked me to go over the statement and advised me that the United States Attorney had given you clearance to call me and discuss my statement with you, which we did.

Q. And did you give me the contents of those two statements at that time, generally, what was in them?

A. Yes, I did.

Q. I will ask if the first time this question of registration was mentioned, I ask you if you had asked Tony Biswell if these guns were registered.

A. Would you rephrase that?

Q. After you had given me the contents of your statement, I will ask—I will ask if I inquired of you, did you at any time ask Tony Biswell if these guns were registered?

A. Yes, I think I did.

Q. And at that time, do you recall, did you say after a pause, "I believe I asked if they were registered [115] and he didn't know what I was talking about?"

A. That is more or less what I replied.

Q. You didn't arrest him at that time when you seized the guns?

A. No, I didn't.

Q. It was the next day when you came back that you had an arrest warrant and arrested him on the charge?

A. I arrested him at ten-twenty-five a.m. the next day, when he happened to be in the police department, I think conducting some other business.

Q. So, when you seized these guns, they were not seized as an incident of his arrest?

A. They were seized prior to his arrest.

Q. Now, you are talking about the measurements of this rifle that has been identified as Government's Exhibit Number Three.

Will you state how you measured the barrel of that rifle, to the jury, by pointing out all the——

A. At—on this firearm, this is a .22 caliber cleaning rod. All right, I started from the muzzle and brought the tape

down to here (indicating) which is just above the receiver. You can see the chamber, the face of the chamber. You can see that right there (indicating).

Q. Now, are you saying that you measured down [116] to where the cartridge would fit into the muzzle of the gun here, or to the edge of this piece that goes across here?

A. I measured to the face of the chamber.

Q. To the face of the chamber? Now, do you have any kind of measuring device with you?

A. No, I don't.

Q. And you say that the barrel measured, to the point to where you measured, is fifteen and three-quarters inches in length?

A. Within a very small margin.

Q. Do you know of anything in the law that describes the barrel of the gun?

A. Yes.

Q. What law is that?

A. It is in the Gun Control Act of 1968, under definitions.

Q. As to the barrel of the gun?

A. Yes.

Q. And it tells you where to measure it from?

A. To the face of the bolt—of course, now, you are trying to put words in my mouth. I don't recall exactly whether the law states where to measure the firearm from, the barrel.

However, we measure to the face of the bolt.

[117] Now, the barrel, the actual rifle portion, however, we are—it is the policy that this overall concealability of the weapon is brought into effect as far as the barrel length, so you are given the benefit of the doubt of the length of the cartridge.

So in the case of a 30.06, the rifle portion would be much less than it would be in the case of a. 22.

Q. Now, what you are saying is that you don't know of any law that says that you have got to measure this barrel from the face of the bolt, is that correct?

A. No, that is not exactly what I am saying. However, I will be glad to refer to the Gun Control Act, if I will be allowed to.

Q. Very well. Now, let me ask you if you know of any rule or regulation by your department which sets forth where to measure this barrel?

A. As I said, we measure the barrel from the face of the bolt.

Q. But you didn't answer my question, as to whether or not you know there is a rule or regulation.

A. That is we possibly—measure from that—I cannot quote to you the statute, the kind of statute. There are—we are giving you the benefit of the doubt because sometimes you will have a shorter length barrel, the barrel is generally described as a rifle portion—

[118] Q. And where is that defined?

A. In the Gun Control Act.

A. And you are saying that in the rules and regulations, or in the law, there is something there which tells you exactly how to measure these barrels?

A. I wouldn't want to answer that question until I could refer back to the Gun Control Act.

* * * *

[120] REDIRECT EXAMINATION

By MR. RE VEAL:

Q. Mr. Hupp, how long have short guns that you are talking about been described by law?

A. Since early 1930.

Q. Now, when you went into Mr. Biswell's place of business on the fourth of February, was Mr. Biswell cooperative or not?

A. No, he was very uncooperative.

[121] Q. When you told Mr. Biswell you wanted to inspect his stock of weapons, and back into his storeroom, what was Mr. Biswell's response?

A. He wanted to deny me entrance.

Q. Well, what did he do?

A. Well, he said you can't go back there. And I explained to him that it was a licensed premises and it was open to inspection during normal business hours.

And I showed him the section of the law. And at that time he agreed, he said, "If that is the law, I guess it is all right."

* * * *

[139] THOMAS G. HUPP

was recalled as a witness on behalf of the plaintiff, and testified further as follows:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. You are the same Thomas Hupp that testified here yesterday?

A. Yes, sir.

* * * *

Q. (Mr. Re Veal continuing.) Now, referring to February 4, 1970, when you were at Hobbs, New Mexico, at Tonys Loan and Pawn Shop, when you seized the rifles, that we were talking about the other day, what was said, if anything, what was said about the registration of these [140] weapons?

MR. EASLEY: If the Court please, we object to this testimony on the grounds it already has been gone into and Agent Hupp has testified as to what was said.

THE COURT: Well, I'm going to let him testify, if there is something that hasn't been said—of course, I don't want to repeat the part that he testified to yesterday, because that would seem to put undue emphasis on it.

But if there was something else said that wasn't said yesterday, I'm going to let him testify.

Q. (Mr. ReVeal continuing.) All right, Agent Hupp, restrict your testimony, your answer to that question, to things that were discussed between you and Mr. Biswell other than what you talked about yesterday.

A. Well, I explained to him what was required, that the firearms had to be registered, and asked him if they were registered.

* * * *

Q. Was any certificate of registration produced by Mr. Biswell on any of these weapons?

A. No, there was not.

Q. Now, when I say certificate of registration, I mean a certificate from the National Firearms Registration and Transfer Record, specifically. Was such a certificate produced?

[141] A. No, sir.

Q. On either weapon?

A. No, sir.

Q. At that time there was no United States Commissioner in Hobbs?

A. No, there was not.

Q. Was the one in Carlsbad the nearest commissioner?

A. Yes, he was.

Q. And how did you transport Mr. Biswell to Carlsbad?

A. In my government vehicle.

[142] Q. During the course of your transporting Mr. Biswell from Hobbs to Carlsbad, did you have any conversation with Mr. Biswell?

A. Yes, I did.

Q. What was said at that time?

A. Mr. Biswell stated to me that he knew that this was coming, that it was only a matter of time.

CROSS EXAMINATION

* * * *

Q. (Mr. Easley continuing.) What else was said during this conversation with Mr. Biswell in the automobile?

[143] A. He asked me if I knew about a pawn dealer in El Paso who had gotten in trouble with the Federal Bureau of Investigation in regard to some stolen military ammunition.

Q. Did he say anything else more about this case or knowing anything about these two guns being illegal?

A. No. Not that I recall.

Q. Now, you had already been to see at least one other dealer there in Hobbs that morning, had you not, before you came to see Mr. Biswell?

A. That was in the afternoon when I visited the other dealer, just prior to going to Mr. Biswell's place.

Q. You didn't say what dealer that was, do you recall?

A. Yes, I do recall, it was Al's Pawn Shop.

* * * * *

[144] BILL FOWLER

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. Would you state your name, please?

A. Bill Fowler.

Q. And where do you live, Mr. Fowler?

A. Hobbs, New Mexico

Q. And by whom are you employed?

A. City of Hobbs, Police Department.

Q. And were you so employed on February 4 and 5 of this year?

A. Yes, sir, I was.

Q. And what is your capacity with the Hobbs Police Department?

A. I am lieutenant in charge of the detective division for the Hobbs Police Department.

Q. On the fourth of February, did you have occasion to go to the place of business of Mr. Biswell?

A. Yes, sir, I did.

Q. Did you go there alone?

A. No, sir, I went with Tom Hupp with A.T. & F.

[145] Q. And in what capacity did you go to Mr. Biswell's pawn shop?

A. I went with Mr. Hupp to make a routine check of the gun law that he enforces.

Q. Well, is it the practice of the Hobbs Police Department to send someone along with an investigator such as Mr. Hupp in the course of his investigation?

A. Yes, sir, it is.

Q. Had you been with him when you went to Al's Pawn Shop that day?

A. Yes, sir, I was.

Q. Did you accompany Mr. Hupp as he went through Mr. Biswell's shop?

A. Yes, sir.

Q. Were you there when—let me ask you if you have ever seen Plaintiff's Exhibit Number One before?

A. Yes, sir.

Q. And where did you see that?

A. I seen this in the back room of Tonys Pawn and Loans in Hobbs, New Mexico.

Q. And on what day was that?

A. February 4, 1970.

Q. Let me ask you if you have ever seen Plaintiff's Exhibit Number Three before?

A. Yes, sir.

[146] Q. And where did you see that?

A. At Tonys Pawn and Loans on February 4, 1970.

Q. Is this when you were there with Agent Hupp?

A. Yes, sir.

Q. Were you there when Agent Hupp picked these things up from the rack?

A. Yes, sir, I was.

Q. Was there a conversation at that time between Agent Hupp and Mr. Biswell with regard to these weapons?

A. Yes, sir.

Q. Would you relate that conversation to your best remembrance, please?

A. When Mr. Hupp picked the first gun up, the shortest .22, he measured it. And he asked Mr. Biswell if he had the gun registered. And Mr. Biswell said, "No," and then there was some conversation about how you would go about registering them and getting a serial number assigned to the gun.

Q. Was there any conversation between Mr. Hupp and Mr. Biswell on the longer of the two weapons that was picked up?

A. Yes, sir.

Q. Would you, to your best recollection, tell us what that was, please?

[147] A. The conversation was in regards to where he had obtained the gun and who from. And Mr. Biswell stated that he had gotten the gun from a Ralph Sias, I believe, was the name.

It was Ralph something, it was a Spanish last name.

Q. Was there any conversation between Mr. Biswell and Mr. Hupp in regards to the registration of Plaintiff's Exhibit Number Three?

A. Not that I recall.

MR. RE VEAL: Your witness.

[148] CROSS EXAMINATION

* * * * *

Q. (Mr. Easley continuing.) I will ask if you were present at all times at Tony Biswell's when Mr. Hupp was doing this talking there about the two guns, after you had gone back into the back room?

A. Yes, sir, I was present during this period of time.

Q. And your recollection now is that what you heard was when Mr. Hupp picked up this short gun and he asked Tony Biswell, "Is it registered?"

A. Yes, sir, after he had measured the gun.

Q. And was this before or after he read this little card to him, telling him what his rights were.

A. It was before.

Q. And your testimony now is that Tony said, "No?"

A. Yes, sir.

• • • •

[149] Q. What else happened back there, if you will tell us, what other questions were asked and what answers were given?

A. I don't recall the exact questions or the answers. I can recall the general conversation.

Q. Relate that to the jury, if you will?

A. The general conversation was when Mr. Hupp asked Mr. Biswell if the gun was registered under the Federal Firearms Act and Mr. Biswell said, "No."

The general conversation was how you went about registering it and getting the certificate.

The reason that I can recall this is because I didn't know you could register a short gun period. I thought that if you had one, it was an illegal weapon without any kind of registration.

• • • •

[150] Q. Now, you have had occasion to be in that storage room before, haven't you?

A. Yes, sir, I have.

Q. And the pawned guns are—Tonys pawned guns and lay-a-way guns are kept in there?

A. It is my understanding that his pawned guns are kept in this room. The room where we picked these [151] two short guns up.

Q. And these two rifles, did you see any evidence there that there been any attempt to conceal them?

A. No, sir, they were in plain view.

• • • •

[155] (Mr. Easley continuing.) Mr. Fowler, to renew my question, did you have occasion to talk to me in the office of Mr. ReVeal and Mr. Watkins yesterday morning?

A. Yes, sir, I did.

Q. And do you recall whether or not they were both present?

A. Yes, sir, they were both present.

Q. And do you recall who else was present, if anyone?

A. Mr. Reynolds.

Q. At that time, this matter was discussed as to what was said about the registration—

A. As I recall it, you asked me to tell you what had taken place in Mr. Biswell's place of business that afternoon of February 4th. And I told you what I recalled.

Q. And on this question of registration, I will ask if you didn't at that time say that Mr. Hupp asked Mr. Biswell, "Is this gun registered?"

And if you didn't answer, "I don't recall what Mr. Biswell said?"

A. I believe that I didn't recall exactly what [156] he said. That it was my impression that he meant, "No" with his answer. But actually, I don't recall the exact terminology, the exact words that were used, no, sir.

Q. But he didn't say "No" as you testified to previously?

A. No, sir, not just—I couldn't say that he said a straight out "NO". No, sir, I couldn't say that.

Q. It could have been that he said he didn't know anything about it?

A. No, sir, my impression was that his answer was "No", but not maybe—not those exact words.

* * * *

[157] JOHN D. SULLIVAN

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. Would you state your name, please?

A. John D. Sullivan.

Q. Mr. Sullivan, will you speak into that microphone, please, so that the jury can hear you?

A. What was that?

Q. There is a microphone there, would you try to speak into it so that the jury can hear you a little better.

Mr. Sullivan, where do you live?

A. I live in Hobbs, New Mexico.

Q. And what is your profession?

A. I am an accountant.

Q. As an accountant, do you know Mr. Biswell?

A. Yes, sir.

Q. How long have you known Mr. Biswell?

A. Seventeen years.

Q. And in what capacity have you known Mr. Biswell?

[158] A. Well, I did his book work for him.

Q. You do Mr. Biswell's bookkeeping for him, do you?

A. Yes, sir.

Q. How long have you done the bookkeeping for him?

A. Since 1953.

Q. During the course of your employment by Mr. Biswell, did you have an occasion to discuss with him the Gun Control Act of 1968?

A. I don't think so.

Q. Did you have any occasion to discuss it with him, any of the gun laws?

A. Well, the only thing that I ever did about that was to show him an editorial in the paper.

Q. Now, Mr. Sullivan, before you go on, could you place this discussion or conference you had with Mr. Biswell to some period of time?

About when did this happen?

A. Well, I don't exactly recall, but I imagine it has been about eighteen months ago, maybe.

Q. All right. And you showed Mr. Biswell an editorial in the paper and——

A. Yes, sir.

Q. Do you recall the subject of that editorial?

[159] A. Well, the editorial had reference to this gun law that the Honorable Senator from Montana had put an amendment to. But Tony told me he already knew about it.

MR. RE VEAL: Your witness.

MR. EASLEY: Excuse me a minute, Judge.

We have no questions, Your Honor.

* * * *

MR. EASLEY: If the Court please, we renew our previous motions as to the constitutionality of the statutes permitting the search here of this private storage room under the search and seizure law.

* * * *

[160] THE COURT: All right, the motions will be denied.

* * * * *

LOARN ANTHONY BISWELL

was called as a witness herein on his own behalf, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

* * * *

[164] Q. What is the nature of this pawn shop business? Will you explain to the jury what you do in the pawn business, [165] Mr. Biswell, there in Hobbs? What does it consist of?

A. Well, people, of course, need money. They bring in merchandise and whatever merchandise they bring in, that is a pledge of security for whatever amount of money it will bring normally. And normally all pawns for the State of New Mexico is for a period of thirty days.

And they have any time limits—any time within that period of thirty days to pick up their pledge.

Q. What type of items do you get in?

A. Everything. Everything that has any loanable value to it.

Q. What size place do you have there, Mr. Biswell?

A. My frontage is a hundred and twenty-five foot. Then my depth, I think is a hundred foot, it is rather good sized.

Q. Do you have merchandise in all parts of this building?

A. Oh, yes, I have probably overly stocked for the size of my building.

Q. Is this a volume type business or just infrequent people coming in?

A. Oh, it's rather a large volume of business. You have quite a number of people, a multitude, who—you have your pawns and you have your resale merchandise [166] and, of course, you also have the tape center there and a multitude of younger people come in and buy these tapes, you know, these cartridge tapes that they play in the cars.

Q. Do you purchase new merchandise also?

A. Not too much other than just buy new tapes and a few new guns is what it mostly consists of.

Q. How many people on the average come into your place in a day's time to pawn things to you? Can you estimate?

A. In the pawn only, I would say roughly around twenty-five up to around seventy-five. It more or less depends on the time of the month. Sometimes before payday, of course, there is a lot more. It is kind of a rough estimate there.

Q. And are you busy at—busy all of the time—do you spend full time there at your store?

A. Oh, yes, I am there all of the time. It is very demanding and I almost have to be there other than in the mornings, I have to run into the bank. But that is the only time I leave unless it is an emergency or something and I have to leave.

I eat there and all, I don't leave.

Q. What time do you open up?

A. Eight a.m.

[167] Q. And what time do you close?

A. Seven p.m.

Q. And how many days during the week?

A. Oh, the only day I close is on Christmas day. I am open every day.

Q. Now, do you have anyone else who puts the prices on these pawns as they come in, the loan value?

A. No, I do all of the pricing of the merchandise. Sometimes I might have other girls here make out the tickets, but I do the actual appraising myself.

And also on the repossessed merchandise, if they fail to redeem it, I leave it there for a few more days and then if they don't pick it up, they will pull it out and I price it or I will tell the people how to price it.

Q. Do you have some of that merchandise there that doesn't have any price on it that is in stock?

A. Oh, yes, I have quite a bit of it. I have a multitude, like tools, and as such small miscellaneous type of merchandise, it is impossible to, you know, price every tool. And maybe a large amount of watches, it is almost impossible to price every piece of merchandise that comes and goes.

Q. Do you pawn any guns?

A. Oh, yes, quite a large amount of guns. In that [168] locality, quite a few guns.

Q. What would you say, what would you estimate, the number of guns you pawn in a day or a week? Do you know?

A. Just actual pawn, I would say that I would probably

pawn—just an estimate—I would imagine, around fifty a week.

Q. Did you, let's say, just the last few days, could you give the jury some kind of an estimate in numbers, that you have pawned, if you recall?

A. Yes, I think the day before yesterday I pawned twelve. Of course, actually, there are more guns than that that pass over the counter where you pawn. buy, sell, and trade. It would probably run an average of around eight or ten a day. Of course, it would fluctuate, you know.

Q. Do you have any time to read the newspapers and listen to the radio and so forth?

A. No, I don't take the papers. I don't even listen to the radio. In this tape center, I have got there—of course, we have got these tape players and all of these people can come in and play the tapes. So, about all I hear is just a lot of music, psychedelic music.

Q. When do you do this bail bond business?

A. Well, of course, I keep the pawn shop open [169] twelve hours a day. And normally at night when I close at seven, if I have a bond, I wait until then. If I can, you know. But normally, ninety-nine percent of my bail bond business is done at night, in the evening after I close.

Q. And over what area does you business extend?

A. Anywhere, but normally my bonds are made, my territory covers pretty much Carlsbad, Artesia, Roswell, Lovington, in that general vicinity.

Q. State to the jury about how many hours a day you work on the average?

A. Well, my wife says I work about twenty-four. But I would say about fourteen or sixteen hours a day.

Q. Now, do you know that there has been a Gun Control Act passed by the Congress sometime in 1968?

A. Oh, yes, I have heard a lot of comment on it. A lot of different gun dealers have come in and, of course, they have voiced a strong objection to it. There is just quite a bit of conversation and like that. And I didn't actually read the law.

Q. Did you ever see anyone of these men from the Alcohol, Tobacco, Firearms Division after 1968 up until Mr. Hupp?

A. No, the only one I saw was about five years [170] ago, other than Mr. Hupp, you know.

Q. Did you get anything through the mail in the way of explanation of the Gun Control Act that you know of?

A. I really don't know. I may have. I can't recall.

Q. Did you read anything which gave you the details on the Act in regard to sawed-off rifles?

A. No, sir.

Q. Did you get any rules and regulations that you are aware of that included an explanation that sawed-off rifles were illegal and that they had to be registered?

A. No, I wasn't aware that they were illegal.

Q. Were you aware that there were other illegal weapons that you weren't supposed to handle?

A. Yes, I knew that sawed-off shotguns, a certain length, under eighteen inches, I believe it is, and then, of course, I knew that machine guns——

Q. And where did you get this information?

A. Oh, I knew that when I was a policeman. We always, we was always on the lookout for that, too, you know, and, whenever you saw something—but I don't think any of them was aware that sawed-off rifles were illegal, because it never did come up.

Q. If you received any of this information as to [171] the rules and regulations and the Gun Act, itself, you are unaware of it?

A. I don't know of receiving it. I may have.

Q. What is the manner you handle your mail?

A. I don't really handle my mail—well, sometimes I do. It just depends. But my secretary there, of course, and we get so much junk mail, you know, and advertising, that she just goes through what don't seem important—and, of course, my bills, and you know, my pawn payments, people send in something, she enters all of that in.

Q. You have heard Mr. Sullivan say that some eighteen months ago, which would put it back into '68 sometime, he called your attention to this editorial in the newspaper. Do you have a recollection of that?

A. Not that particular one. Of course, I think we all read different editorials in the newspapers, not the exact law, just comments on it.

Q. Did you know that there was a National Firearms Registration and Transfer Record that short rifles like this was supposed to be registered in?

A. No, sir.

Q. Did you know that if at the time you had these short rifles in your possession, that you should have had a dealer's, a special dealer's license, that you [172] would have had to pay two hundred dollars for?

A. No, sir, I wouldn't have accepted them. I mean, I just didn't realize that there was a law like that. That is a little old single-shot rifle——

Q. Now, Snyder, who testified here, and you heard his testimony, told the jury that he brought this little gun in to you.

Do you recall him bringing it in?

A. Yes, I recall Mr. Snyder bringing in a gun, it looked like that gun.

Q. And is this the gun in your judgment, that Mr. Hupp later took from your back storage room?

A. Well, I would say it is. I don't know.

Q. At the time you took that, did you have any thought at all that you were violating the law?

* * * *

Q. (Mr. Easley continuing.) State what you recall, if anything, about your conversation with Mr. Snyder with regard to this weapon.

A. Oh, no more than any other customer that comes [173] in with a piece of merchandise and they want to pawn it. I don't know whether he said what he wanted, but I told him what I would give him for it. I just made him out a pawn ticket, like I would anything else.

I didn't realize that it was an illegal piece of merchandise. I just pawned it.

Q. Did you make any effort to hide it or conceal it?

A. Oh, no, to me, it is just a gun. Just a little old single-shot gun.

Q. If the Court please, may I call attention to Defendant's Exhibit V and ask if you recognize that piece of paper?

A. Yes, that is my daily report sheet of all of the things pawned that I have to make to the City of Hobbs.

Q. And is this dated—there is an entry here on January 13th?

A. Yes, sir.

MR. EASLEY: If the Court please, we would like to offer this in evidence.

* * * * *

[176] MR. EASLEY: If the Court please, I was asking the witness about Defendant's Exhibit V and at this time, I move that it be introduced into evidence.

THE COURT: All right. It will be admitted.

(THEREUPON, Defendant's Exhibit DV was duly received in evidence.)

Q. (Mr. Easley continuing.) Mr. Biswell, in looking at this Defendant's Exhibit V, is there any indication on there as to the pawning of this rifle by Mr. Snyder?

A. Yes, sir, it is right here, this eight seven nine six.

Q. Now, speak up so the jury can hear you.

A. Yes, it is right here. All of the items are on here numerically numbered and here is the Snyder rifle right here.

Q. Will you point it out to us and indicate where it is on this sheet?

A. It is this one right here. And this rifle right here. And there is the man's complete name, his complete address, his complete social security number, and sex, the date and the time it was pawned.

Q. State what time that is on there.

A. That was at seven p.m.

[177] Q. And is that the time you closed?

A. Yes, but sometimes we can't close quite at seven because we have some business coming in and so we close as soon as we can.

Q. Does this indicate the time that the first pawn was made here on this sheet?

A. Well, every pawn entered on this sheet, this is a record, the first pawn on this sheet was six-ten and the last pawn that day I made was seven p.m.

So, from six-ten to seven p.m., I made thirteen pawns.

Q. That is from six-ten until seven o'clock?

A. Yes, six-ten p.m. until seven p.m., yes.

MR. EASLEY: May I present this to the jury?

THE COURT: Yes, you may do so.

Q. (Mr. Easley continuing.) State whether or not at that

time of the day you are more or less busy than at other times?

A. That is normally my busiest time between six and seven. That is when more of the working force gets off, I guess. And that is when—that's why I stay open later, for that reason, to accommodate them.

Q. Plaintiff's Exhibit Two purports to be a copy of the pawn ticket which Mr. Snyder identified as the one which represents this pawn?

[178] A. Yes, sir.

Q. Did you have the original of that pawn ticket in your possession?

A. Yes, sir, I keep the original on file and I give the copy to the customers.

Q. I hand you what has been marked as Defendant's Exhibit W, and ask if that is the original of the pawn ticket?

A. Yes, sir, that is the original, and that is the copy. I retained this and I gave this to the customer (indicating).

Q. Would you look on the back of that ticket and see if there is some writing there?

A. Yes, sir.

Q. Is that your handwriting?

A. Yes, sir, that is my own handwriting.

Q. And what does it say there?

A. It says "recorded and received as illegal, February 4, 1970."

Q. Thank you, sir.

MR. EASLEY: We move for the introduction of Defendant's Exhibit W, if the Court please.

MR. RE VEAL: No objection, Your Honor.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit DW was [179] duly received in evidence.)

Q. (Mr. Easley continuing.) At the time Mr. Sills brought the gun into you that has been introduced into evidence, do you have a recollection, an independent recollection, of when that was?

A. The exact date?

Q. Yes.

A. No, sir, not just the recollection of the exact date.

Q. I will hand Plaintiff's Exhibit Three to you and ask you if you recall whether or not that is the gun?

A. Yes, sir.

Q. And how do you identify it?

A. By my handwriting here with his name and the date and the amount on it.

Q. And at the time this gun was seized by Mr. Hupp, he testified he asked you about whose gun this was?

A. Yes, sir.

Q. State what you recall about that conversation?

A. Well, when he picked it up, he just asked me did I have a ticket on it and did I know whose gun this was. And I gave him the information on it, yes, sir.

Q. Does this have a pawn ticket number of some kind on it?

[180] A. It has a person's name, date it was pawned, and also the amount that was owed against it and when he was going to pick it up.

Q. How much does this indicate the pawn was for?

A. The payoff on this is three and a half—you mean the amount it was pawned for or the payoff?

Q. What is on the ticket there?

A. Three and a half.

Q. Relate to the jury if you recall what was said as between you and Mr. Sias when he brought the gun in?

A. No more than any other pawn. He just brought it in and just wanted to borrow some money on it. So, I just made him a loan on it and put his name on it.

Q. Now, did you fill out a pawn ticket yourself, do you know?

A. No, sir, sometimes when we are so busy at the counter, I only work out of one pawn book because they are all numbered, and so I have to go in numerical order.

And sometimes if we are real busy, I have sometimes one of the girls make the pawn ticket, I just take the person's name and the information on it and just stick it on the merchandise and give him a little ticket. [181] And when she gets caught up, I go and make out the regular ticket.

Q. Did you have any record on this gun other than the name on the butt as far as you know?

A. I don't believe I did, that I know of, no, sir.

Q. At that time, did you make any effort to conceal the gun or did you consider it as an illegal weapon?

MR. RE VEAL: Your Honor, I will object to this as being leading.

THE COURT: Yes, objection is sustained.

Q. (Mr. Easley continuing.) Do you know who placed the gun back in the storage room?

A. Yes, I have a boy working for me that does all of the relaying of the merchandise back and forth. He takes care of all of my stock and inventory in pawn in my private storeroom, you know. That stuff is left there by the customers.

Q. And do you know—do you have any independent recollection as to whether or not he took the gun back to storage?

A. I don't know for sure. Now, I have another boy that works for me and he also assists in the storage. One guy, he is pretty much hired for the job, and the other [182] guy helps him out when he gets crowded, you know, gets busy.

Q. Was there anything said at any time when Mr. Sias came in there about the registration of the firearm?

A. No, sir.

Q. And was there anything said about a serial number on the firearm, on that firearm?

A. No, sir.

Q. Now, you heard Mr. Hupp testify here, Mr. Biswell, that when you went back to the back of the building, that he found these short guns.

If the Court please—I am going to hand you Defendant's Exhibit M, and will you tell us what that portrays?

A. That is one of my main storerooms. This is my private storeroom of all of the merchandise that are in pawn. And, of course, it is not there for display, because it is not for sale, it is all these pawns.

Q. And is this area where the guns were indicated, is that where you keep some of the guns in pawn?

A. Yes, that is not all of them, but that is part of them in that area.

Q. I will hand you Defendant's Exhibit N and ask if you recognize that?

A. Yes, that is the other half of this here which [183] all consists of one big storeroom, where I keep all of the pawn stuff.

Q. Would you stand down here just a moment, Mr. Bis-

well. On the right-hand side——

MR. RE VEAL: If Your Honor please, could we have these offered?

MR. EASLEY: If the Court please, we will offer these in evidence.

THE COURT: All right, is there any objection?

MR. RE VEAL: No, we have no objection.

THE COURT: They will be admitted.

(THEREUPON, Defendant's Exhibits Numbers M and N were duly received in evidence.)

Q. (Mr. Easley continuing.) I will call your attention to some coke cases here on the right-hand side of the—Defendant's Exhibit M—and on the left-hand side of Defendant's Exhibit N, and ask if those are the same coke bottles, indicating two separate pictures of one wall?

A. Yes, sir, this is all one wall, one wall and one part of the storage room, yes, sir.

Q. Now, I call your attention to the right-hand side of exhibit N, and ask what were—where the door is leading out to the front?

A. There is a large door right here, it's a door [184] approximately this wide (indicating) that goes into another storeroom for just about ten foot and then you go into the front part of the building.

Q. Now, you are pointing to the right-hand side of exhibit N as to where the entrance door is?

A. Yes, you can vaguely see the door right here but the door, of course, is actually about four or five foot wide and——

Q. Now, while you were on your feet, Mr. Biswell, let's call attention to Defendant's Exhibit K, which has already been introduced into evidence and how does that picture fit into these two?

A. Well, you can actually see this piece of wood right here, which is this piece of wood, but here is my big piece of—doorway—and right here is the entrance right here to that and, of course, you just go up into here and then you go into my front, my front place of business.

All of this space is storage area.

MR. EASLEY: If the Court please, I would like to offer into evidence Defendant's Exhibit P, also.

THE COURT: Any objection?

MR. RE VEAL: No objection.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit P was duly [185] received in evidence.)

Q. (Mr. Easley continuing.) I call your attention to Defendant's Exhibit P and ask what that represents there.

A. Well, that is just the left side of the wall you saw the guns—this is just the left side just like—it is a long room and this is this side and all of the guns are up and down that side (indicating).

Q. So that is the left-hand side of the door?

A. Yes, sir.

Q. And state what those objects are stacked against the wall.

A. All of these guns and cases—all of these are guns in cases. Now, I separate the guns in the cases over from the guns that are not in cases. It gives you a little bit more space in recovering the merchandise.

So I keep them separated that way. They are all right here in plain view. This is all pawned merchandise (indicating).

Q. You may take the stand, there.

Do you have any idea as to how many guns that you have taken into pawn in the last, say, two years?

A. No, it is quite a multitude. I couldn't give you the exact figure, it's quite a large amount.

[186] Q. Now, Mr. Hupp said that this short rifle was just inside that door, or strike that, if the Court please.

I want to ask you one other question.

Judging from the number of guns that are in this picture, state whether or not you usually have that many guns or, or more or less?

A. Oh, I have at least that many at all times. A lot of times more. Of course, that is just my rifles, that is not my hand guns.

Q. How many hand guns would you say you normally have in pawn?

A. Gee, I would say—I can only give you a rough figure. I would say at least around two hundred.

Q. Now, when Mr. Hupp picked up this short rifle, let's

hear what you have to say about what transpired after that. Tell the jury what happened as far as you can remember?

A. He went back in the back room and [redacted] walked down in the area here and the short guns were along with all of the rest of those guns you see there. And they were sitting there kind of by the door and he immediately grabbed the gun up.

And then he pulled a little celluloid card out of his pocket and he read me some type of rights out of this card there. And then he asked me if I had a sheet [187] or slip on this gun. And I said, yes. So I checked the number of the gun. I went back up in front and I got my pawn tickets and then my daily sheet and then I showed him my records I had on the gun.

I think he took down the numbers and address. I am not for sure.

Q. Now, what else was said there? Just tell the jury what took place.

A. Well, he picked up the gun. He seemed rather surprised, or something. He picked the gun up and then he asked me, "Are you aware of the fact that this gun is illegal?"

And I said, "No, I am not."

And then he read me that right deal, and that is all I remember that he asked me other than if I had the sheets on it or papers on it.

And, of course, I assumed when he said papers that the bill of sale is—the pawn ticket I had made on the gun.

Q. I asked you, do you recall him saying anything about registration of the gun?

A. No, sir, I don't. If he said registration, I assume he meant this pawn ticket. I don't recall him saying that. I just recall him asking me if I had the papers on the gun. And, of course, by that I assumed he meant the [188] pawn tickets.

Q. And what transpired when he picked up the other gun belonging to Mr. Sias?

A. Well, of course, when he got that one—I don't recall —in—I think that him and Mr. Fowler, they said something probably among themselves, and then he went on after all of this transpired.

And then he went on and he found this other gun. And he also asked me the same thing, if I had the papers and all on this gun.

And I said, "Yes, I have the pawn tickets and whatever is needed on it."

But he didn't ask me if I was aware that the gun was illegal because I wasn't. They were just there with all of the guns, you know.

Q. Did he say anything to you about having a license to handle these destructive devices at any time while he was there?

A. He asked me if I had a license. And I showed him the license that I had, the regular firearms license. But he didn't, knowingly, ask me about a license to handle gangster weapons, and destructive items or whatever that code reads there.

Q. When did he inquire as to your regular firearms license? Was this before or after he saw the [189] short guns?

A. It was before.

Q. This was before he went in to the storage room?

A. Yes, sir.

Q. And after he went into the storage room, did he at any time, ask about any kind of license?

A. Not this big—this registration license, no, sir, not that I recall.

Q. At any time did he say anything to you about whether or not you had serial numbers assigned to these guns?

A. I don't recall just exactly. Not knowingly, did he ask me. I don't know what you mean by assigned, now. A lot of guns have serial numbers but they are put on by the manufacturer.

Q. Did he ever tell you or ask you anything about the Secretary of the Treasury or his delegate assigning serial numbers to those guns?

A. No, sir, I don't remember that.

Q. Did you take these guns knowing that a serial number must have been assigned to them by the Secretary of the Treasury or his designated officials?

A. Oh, no, sir.

Q. Did you take them and possess them knowing that

[190] you had to have a special license for handling that type of weapon?

A. No, sir, I did not.

Q. And did you take them knowing that a serial number must be assigned to them, by them?

A. No, sir, I did not.

Q. Did you have any intent or knowledge to disobey the law in handling these weapons?

A. No, sir, no, siree.

MR. EASLEY: Pardon me just a minute, Judge.

If the Court please, one other picture that I overlooked that we didn't bring in the courtroom, if the Court would indulge us just a moment.

THE COURT: All right.

MR. EASLEY: If the Court please, I would like to offer into evidence Defendant's Exhibit A.

THE COURT: Any objection?

MR. RE VEAL: No objection, Your Honor.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit A was duly received in evidence.)

Q. (Mr. Easley continuing.) Mr. Biswell, I will ask if you recognize that picture as—designated as Defendant's Exhibit A?

A. Yes, sir, that is about half of my loan [191] company there, one side of it, yes, sir.

Q. Which side is that?

A. That is the west side of my loan company. Here is my front door, right along here (indicating).

Q. You are pointing to the left side of exhibit A as your front door?

A. Yes; sir, this is my front door that goes to the outside of my business.

Q. Now, state where the door that you indicated was on the right goes?

A. It goes—that door says "no admittance, employees only", that is my private storeroom where I keep all of my pawned merchandise.

MR. EASLEY: Very well, pass the witness, Your Honor.

THE COURT: All right, you may cross examine.

CROSS EXAMINATION

By MR. RE VEAL:

Q. Mr. Biswell, did you on February 4, 1970, have a license to do business, to deal in sawed-off rifles, short rifles, or short shotguns? Had you obtained a license from the Secretary of Treasury?

A. No, sir.

[192] Q. Had you, in fact, paid the special occupational tax of two hundred dollars to the Secretary of Treasury or his delegate in order to obtain such a license?

A. No, sir.

Q. Had you applied for such a license?

A. No, sir.

Q. Have you, at any time, ever had such a license?

A. No, sir.

Q. Do you have one today?

A. No, sir.

Q. With regard to the rifle pawned to you by Mr. Snyder, that would be the shorter of the two of the ones we are talking about, I believe. Have you, yourself, registered that weapon with the National Firearms Registration and Transfer Record?

A. You say did I?

Q. Yes, have you?

A. No, sir.

Q. Have you ever done that?

A. No, sir.

Q. Have you ever applied to the Secretary of Treasury for a serial number for that weapon?

A. No, sir.

[193] Q. With regard to the rifle pawned to you by Mr. Sias, the longer of the two rifles we are talking about, Plaintiff's Exhibit Three, have you ever registered that weapon with the National Firearms Registration and Transfer Record?

A. No, sir.

Q. Have you ever applied to do so?

A. No, sir.

Q. Have you ever applied to register the Plaintiff's Exhibit One, the Snyder weapon?

A. No, sir.

Q. Have you ever applied to the Secretary of the Treasury or his delegates for a serial number for the Sias weapon?

A. No, sir.

Q. Plaintiff's Exhibit Three?

A. No, sir.

Q. How long have you had a pawn shop in Hobbs?

A. Approximately about twelve years.

Q. And prior to that time, were you a policeman with the police department?

A. Yes, five years.

Q. And during the course of your duties as a policeman with the Hobbs Police Department, I believe you testified you had an occasion to look for and be aware of [194] illegal weapons?

A. Yes, sir, sawed-off shotguns and machine guns, yes, sir.

Q. And during that time, have you—you said you obtained—did you obtain any training with regard to illegal weapons in the course of your in-service training?

A. We didn't have any type of school or anything. At that time, they didn't conduct the schools. You know, it was in among the officers, there.

Q. And so you had discussion among the officers about illegal weapons, is that correct?

A. Yes, sir.

Q. And these included sawed-off rifles as well as sawed-off shotguns?

A. What was your question?

Q. I said, didn't these discussions include sawed-off rifles as well as sawed-off shotguns? Did they not?

A. No, sir, I wasn't aware of the sawed-off rifles, that they were illegal.

* * * *

Q. About how many employees do you have working in your pawn shop?

A. Let's see, now, three.

Q. Well, in February of 1970, how many did you have?

A. Three.

Q. And I believe it was January when Mr. Snyder

pawned the shorter of the two weapons, January 13th, as I recall. How many employees did you have?

A. Well, when I say employees, I am including myself, I have another guy and a girl and myself.

Q. And your wife works there too, does she not?

A. Occasionally, yes.

[196] Q. Now, you stated that in the course of your regular business as a pawn shop operator, you took these two weapons in pawn, did you not?

A. Yes, sir.

Q. Now, how many weapons do you pawn every week, do you take into pawn weekly, I mean, hand guns, rifles, shotguns?

A. I gave an estimate a while ago of approximately fifty a week. But it is just an approximate figure.

Q. And how long have you been pawning weapons at that rate?

A. Well, my business has gradually been improving. My records—it has increased a little every year, yes, sir.

Q. How many of these weapons do you return every week?

A. That is redeemed?

Q. Yes.

A. Normally on guns, I'd say a hundred, I am just quoting a figure, I would say probably sixty to seventy-five percent of them are redeemed.

Q. So, if you take in fifty a week, you would return about thirty, or fifty percent of fifty?

A. Probably thirty or forty, maybe a few more. It would depend.

* * * *

[198] Q. Well, now, with regard to this rifle pawned by Mr. Sias, Plaintiff's Exhibit Number Three, do you recall what time of day it was that rifle was pawned?

A. I believe in the afternoon, yes.

Q. Would it have been after six o'clock in the evening?

A. I don't believe it was that late.

Q. So it wasn't during the busiest part of your day, was it?

A. It's hard to say, really, when the busiest time of the day is.

Q. Well, you said earlier it was between six and seven, the busiest part of your day?

A. On my pawns, but not on my retail, there is a fluctuation on that.

Q. Well, when Mr. Sias pawned this weapon, what did you do with it?

A. Like I do all merchandise, everything is pawned. I have my counter, say, this is the pawn counter (indicating) and all of my pawned merchandise, after it is pawned, I set it down here by the counter. Then my stock boy, he picks it up and puts it back, and sets it on shelves that is designated for that type of [199] merchandise.

* * * * *

Q. Well, when Mr. Hupp came into your place of business, he asked to go into your back room. Why didn't you let him go?

A. Well, your back room, of course, is your [200] personal storeroom, and, of course, I was under the opinion that no one has any authority to go back there unless they have the proper papers or permission or search warrant or whatever is necessary, because that is all items that are pawned.

That pertains to all other law enforcement officers. I just assumed it pertained to all of them.

Q. Well, officer, or the Hobbs Police Officer Fowler, he testified he had been in your place of business before and had been back in the storeroom before, hadn't he?

A. Yes, sir.

Q. Did he have a search warrant to go back there each time?

A. No, no, sometimes it was voluntary and sometimes it wasn't.

Q. But you decided not to let Hupp go back there until he could show you some authority, is that correct?

A. No, I didn't decide, I just didn't really realize just what the law was on it.

Q. Well, you heard about the new Gun Control Act of 1968, haven't you, prior to the time we are talking about?

A. I heard that there was a law, yes.

[201] Q. And you are telling the jury here today after

being a police officer for five years and after having been a licensed dealer to handle multi-type firearms for over twelve years, that you made no inquiry or attempt to find out what the new law was and what you were required to do under that law?

A. It is a rather confusing law.

Q. Would you answer the question, please?

A. I didn't read the law. I mean, I didn't read it word for word. I had made a few inquiries from some other dealers and all.

Q. Had you ever had a copy of that law in your possession?

A. I don't recall.

Q. Isn't it a fact that as a dealer you were mailed a copy of the law and a copy of the regulations under it?

A. I don't know if I actually received a copy of it or not. I may have or I may haven't. I couldn't testify one way or the other about it.

Q. But you made no effort to find what the law even though you were a dealer in firearms?

A. Well, I tried to abide by the law.

Q. Well, what effort did you make to find out what the new law was all about?

[202] A. Pardon me?

Q. What effort did you make to find out what the new law was all about?

A. Well, I had discussed it with other gun dealers, occasionally, the topic comes up. How the law varies and how it was changing and everybody seemed rather confused about it. We have all done what we have tried to do, what we have thought was best.

Q. But you didn't contact the Internal Revenue Service or contact your lawyers to find out what the law was all about, did you?

A. Not personally contact them. I just figured they would come around and tell me and instruct me how it should be done more—how it should be done.

Q. As a matter of fact, the area of the law with respect to sawed-off rifles has been the same since 1930, hasn't it?

A. Not that I know of. I wasn't aware of that. I didn't know that.

[213] Q. (Mr. Easley continuing.) Mr. Biswell, you are the same Tony Biswell that was on the stand previously?

A. Yes, sir.

Q. And you have been sworn?

A. Yes, sir.

Q. You heard Agent Hupp make a statement that on the way to Carlsbad, he heard you make the statement to [214] him—something to the effect that you knew that this was coming sooner or later?

A. Yes, sir.

Q. Did you make such a statement to Mr. Hupp?

A. Yes, sir.

Q. And will you state to the Court and jury what you had reference to when you made such a statement?

A. Yes, sir, I knew he had been in town previously. I don't know that day or nothing. And the different other pawn shops and gun dealers had told me he was around making periodical inspections and he was going to inspect all of the gun dealers and pawn shops. So I knew he was going to be by my place, you know, also along with the rest of the other gun dealers to make the routine inspection.

MR. EASLEY: That's all.

THE COURT: Any cross?

CROSS EXAMINATION

By MR. RE VEAL:

Mr. Biswell, as I understand it, this statement that you made was made after you had been packed up at the police department, is that right?

A. At the judge's office, sir. It wasn't at the police department.

[215] Q. So, you didn't make that when he came into the store, but you rather made that after you had been arrested?

A. In route to Carlsbad, yes, sir.

Q. So, isn't it a fact that you made it with reference to that which had finally happened?

A. No, it was made in regard that I knew he was going to come by and make a routine check, that's all.

SUPREME COURT OF THE UNITED STATES

No. ------, October Term, 1970

UNITED STATES,
Petitioner,

v.

LOARN A. BISWELL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1971.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 9th day of June, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-81 ------,

UNITED STATES,
Petitioner,

v.

LOARN ANTHONY BISWELL

ORDER ALLOWING CERTIORARI. Filed ------ December 7, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ------. Circuit is granted.

☆ U. S. Government Printing Office: 1972—453-520/403

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 15 1971
E. ROBERT SEAVER, CLERK

No. 71-81

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit reversing a conviction for dealing in firearms without payment of the special occupational tax.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on May 18, 1971. On June 9, 1971, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including

438-431

July 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inspection provisions of the Gun Control Act of 1968 (18 U.S.C. (Supp. V) 923(g)) violate the Fourth Amendment insofar as they authorize agents of the Internal Revenue Service to inspect without a warrant during business hours firearms on the premises of a licensed dealer in firearms.

2. Whether the inspection and seizure in this case were reasonable.

STATUTE INVOLVED

18 U.S.C. 923(g) provides in pertinent part:

> * * * The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer or collector at such premises. * * *

STATEMENT

After a trial by jury in the United States District Court for the District of New Mexico, respondent was convicted of dealing in firearms, as defined in 26 U.S.C. (Supp. V) 5845, without having paid the special occupational tax required by 26 U.S.C. (Supp.

V) 5801. He was sentenced to imprisonment for a period of two years.

The evidence showed that at about 3:10 p.m. on February 4, 1970 (III Tr. 7),[1] special investigator Hupp of the Alcohol, Tobacco and Firearms Division of the Treasury Department, accompanied by a local police officer, made a routine visit to respondent's licensed pawnshop in Hobbs, New Mexico. After inspecting respondent's records, Hupp asked to see the firearms. When respondent inquired if he had a search warrant, Hupp replied that licensed premises were required to be open to inspection during normal business hours. At respondent's request, Hupp showed him a copy of the statute (18 U.S.C. 923(g)), which so provides. Respondent, a former policeman, read it and said "if that is the law, I guess it is all right" (I Tr. 121, 101; III Tr. 3–5).

Hupp thereupon entered the storage room and found two fully operable sawed-off rifles, which had been pawned to respondent (I Tr. 67, 77, 84–92). Although he had a federal license to deal in sporting rifles and other similar weapons, respondent was not licensed to deal in sawed-off rifles; nor were the two weapons registered (I Tr. 92–93; II Tr. 140, 149). These weapons were introduced into evidence at the trial.

In reversing respondent's conviction, the court of appeals ruled that he had not consented to the entry, and that 18 U.S.C. (Supp. V) 923(g) violated the

[1] The transcript, which we are lodging with the Clerk, consists of three volumes. Volumes I and II are the consecutively paginated transcript of trial; volume III is the separately paginated record of the hearing on pretrial motions.

Fourth Amendment insofar as it authorizes entry and inspection without a warrant. The court held that since the weapons were improperly seized, their introduction at trial was reversible error.

REASONS FOR GRANTING THE WRIT

The decision below, if permitted to stand, would seriously impair effective enforcement of the comprehensive federal gun licensing and registration program enacted by Congress. The court of appeals' decision was, in our view, not required by the Fourth Amendment standard of reasonableness; on the contrary, the decision is inconsistent with the rationale of this Court's recent decision in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, which dealt with closely similar Fourth Amendment issues.

1. Title I of the Gun Control Act of 1968 establishes a licensing program which authorizes routine warrantless inspections of the business premises of a licensed dealer in firearms. This inspection authority is necessary if the danger from the misuse of firearms is to be subject to meaningful government control.

An essential feature of the federal program is that it enables law enforcement authorities expeditiously to trace firearms used in criminal activity.[2] There are approximately 138,000 licensees presently registered under the Act, and there are fewer than 1,500 special investigators of the Alcohol, Tobacco and Firearms Division available to inspect the premises of these li-

[2] The firearms used in the recent killing of a California judge and other persons were traced to their purchaser through records required to be maintained by licensees.

censees. These manpower limitations are compounded by the circumstances that many of the licensees are located in rural areas[3] and the weapons are easily movable. Implementation of a prompt and meaningful inspection program would therefore be seriously hindered if a warrant procedure were required. Accordingly, the statute authorizes non-warrant inspections of carefully circumscribed scope—inspections only of particularized items on the dealer's premises during business hours. This statutory authorization is thus both important to effectuation of the statutory scheme and narrowly drawn so as not to dilute the reasonableness standard of the Fourth Amendment. See *Terry* v. *Ohio*, 392 U.S. 1, 9.

2. Nothing in recent decisions of this Court calls for invalidation of this statutory provision. Indeed, *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, supports our position here.

That case involved the validity of an inspection statute covering business premises licensed to sell intoxicating liquor. The Court in *Colonnade* agreed with the government's basic constitutional contention that Congress "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand", and that this may entail a non-warrant procedure (397 U.S. at 76).[4] The ruling against the government in *Colonnade* turned upon a

[3] In the present case, for example, it would have been necessary to go to Carlsbad, New Mexico, at the far end of the next county, in order to locate a magistrate (II Tr. 141).

[4] The Court further found inapplicable the holding in *See* v. *City of Seattle*, 387 U.S. 541, that the Fourth Amendment barred criminal prosecution of one who has refused entry on

narrow question of statutory interpretation (397 U.S. at 74). The Court concluded that Congress there had not authorized *forcible* entries without a warrant, but had intended enforcement to be achieved "by making it an offense for a licensee to refuse admission to the inspector" (397 U.S. at 77). Thus, far from concluding that the licensee in *Colonnade* was justified in refusing to permit inspection of his premises without a warrant, this Court held that the licensee's refusal to permit the inspection was unjustified but that the government's exclusive remedy for that refusal was criminal prosecution rather than forcible entry.[5] In the present case, there was no forcible entry (see Statement, *supra*), and the seizure and forfeiture of firearms or ammunition possessed in violation of the Act are specifically authorized by Congress. 18 U.S.C. (Supp. V) 924(d).

3. Accordingly, the present case differs significantly from *Bumper* v. *North Carolina*, 391 U.S. 543, on

---

commercial premises to administrative authorities acting without warrant seeking to inspect under a local fire code. As the Court pointed out, *See* had reserved decision of the validity of warrantless inspection under "licensing programs which require inspections prior to operating a business or marketing a product." Compare 387 U.S. at 545–546 with 397 U.S. at 76–77.

The ruling in *Camara* v. *Municipal Court*, 387 U.S. 523—that the Fourth Amendment bars prosecution of one who has refused to allow a warrantless code-enforcement inspection of his personal residence—was also improperly relied upon below. It was a companion case to *See* and did not purport to deal with the kind of warrantless inspection permitted under the statutory scheme involved in the instant case. See 387 U.S. at 533.

[5] The Court emphasized in *Colonnade* that this country's traditions "are strongly opposed to using force without definite authority to break down doors" (397 U.S. at 77).

which the court below also relied. In *Bumper* consent to a search without a warrant had been obtained by coercion [6] in a situation in which a warrant was required in the absence of valid consent. Here, Congress has reasonably authorized a system of limited inspections without a warrant. It was therefore entirely proper for the officers to point to the statute to inform the licensee of their authority to inspect and his correlative statutory duty to consent to such inspection. His consent to the search was, accordingly, valid, rather than coerced. Cf. *Davis* v. *United States,* 328 U.S. 582.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1971.

---

[6] In *Bumper* two days after the alleged offense (rape) but prior to defendant's arrest, four local law enforcement officers gained entry to the premises in which defendant was residing by announcing to his 66-year-old grandmother (who owned the house) that they had a search warrant, which was not the case. The Court held that there could not be consent in such coercive circumstances. 391 U.S. at 546–551. Contrast *Coolidge* v. *New Hampshire*, No. 323, O.T. 1970, decided June 21, 1971 (opinion of Mr. Justice Stewart at 42–45).

APPENDIX A

United States Court of Appeals, Tenth Circuit

May Term, 1971

No. 464–70. Filed May 18, 1971.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LOARN ANTHONY BISWELL, DEFENDANT-APPELLANT

Appeal from the United States District Court for the District of New Mexico

Victor R. Ortega, United States Attorney, and John A. Babington, Assistant United States Attorney, filed a brief for Plaintiff-Appellee.

Warren F. Reynolds, Easley & Reynolds, filed a brief for Defendant-Appellant.

Before CLARK,[1] Associate Justice, HILL and McWILLIAMS, Circuit Judges.

MR. JUSTICE CLARK:

Appellant was indicted on six counts for violating the United States' firearms laws, and was found guilty by a jury on the first count, i.e. dealing in firearms as defined in the Act, 26 U.S.C. § 5845, without having paid the special occupational tax required by 26 U.S.C. § 5801, in violation of 26 U.S.C. §§ 5861 and 5871.

He contends, *inter alia,* that the Act is unconstitutional because it provides for the search of non-public areas of business premises without a search

[1] Associate Justice, United States Supreme Court, Retired, sitting by designation.

warrant. Such a search without a warrant was made of appellant's premises, and guns coming within the terms of the Act were found there. The District Court rejected this contention and sentenced the appellant upon the verdict of guilty on Count One to two years' imprisonment. We find the conviction defective on Fourth Amendment grounds, and, therefore, do not pass upon the other issues raised.

I

Appellant, a former police officer, had been operating a pawn shop in Hobbs, New Mexico for 12 years. On February 4, 1970, Detective Fowler of the Hobbs Police Department and Special Investigator Hupp of the United States Treasury Department paid a routine visit to appellant's shop. Hupp requested inspection of appellant's gun storerooms, and appellant inquired if Hupp had a search warrant. Hupp said "no" but advised that the Federal Gun Control Act authorized it and showed appellant a copy of the law. 18 U.S.C. § 923(g). Appellant then "said okay" adding "[i]f that is the law, I guess it is all right." Hupp found two sawed off rifles in the gun room which were of the length covered by the Act. The guns had been pawned. Appellant had a federal license for dealing in sporting rifles etc., but had none required by the Act for dealers in gangster-type weapons—sawed off shotguns and rifles, machine guns etc. Nor were the sawed off rifles registered.

Appellant was indicted, as we have said, on six counts. The first was for wilfully and knowingly dealing in firearms as defined by the Act without having paid the special occupational tax required; the second and third for possessing the guns, neither of which were registered; the fourth and fifth for possessing

guns not identified by serial numbers as required by the Act; and the last count was for not maintaining proper records with reference to his guns and ammunition. 18 U.S.C. § 923(g). The sixth count was severed and is awaiting trial.

Prior to trial the appellant moved to suppress the evidence as to the rifles because they were obtained by an illegal search and seizure. In this connection he claimed that the authorization to search under the Act was invalid and that his acquiescence to the search was not voluntary. He also moved to dismiss the first five counts because compliance with the requirements of the Act was violative of appellant's privilege against self-incrimination. Further he attacked the classification of the two single shot rifles as "firearms" under the Act as unreasonable and arbitrary; and finally, that the jury findings were inconsistent and the sentence imposed amounted to cruel and unusual punishment. Since we sustain the first contention, and it disposes of the case, we do not find it necessary to pass upon the other points raised by appellant.

II

The basic outlines governing the application of the Fourth Amendment's requirement of a warrant and prohibition against unreasonable searches and seizures was discussed rather fully by Mr. Justice White in *Camara* v. *Municipal Court*, 387 U.S. 523, 528–529 (1967). There it was said that the "governing principle * * * except in certain carefully defined classes of cases" was that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." There a city ordinance gave authorized employees of City departments the right to enter, at reasonable times, any

building, structure etc. in the City to perform any duty imposed upon them by the Municipal Code. The refusal of the occupant to permit the entry was made a criminal offense. The Court found the ordinance defective in not requiring a warrant holding "that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment. * * *" At 534. In a companion case, *See* v. *City of Seattle,* 387 U.S. 541 (1967) this rule was extended to commercial premises. The Court pointed out that it "has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations" (regulatory laws) (at 544) and did not "question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." At 546.

Such an occasion arose three years later in *Colonnade Corp.* v. *United States,* 397 U.S. 72 (1970). There the Court struck down a search made without consent under a federal statutory scheme similar to the one involved here, regarding the federal retail liquor dealer's occupational tax. 26 U.S.C. § 5121(a). The statute, 26 U.S.C. § 5146(b), provided:

> The Secretary or his delegate may enter during business hours the premises * * * of any dealer for the purpose of inspecting or examining any records or documents required to be kept * * * under this chapter. * * *

Section 7606(a) further provided that "The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced or kept, so far as it may be necessary for the purpose of examining said articles or objects." The Court, through Mr. Justice Douglas, said:

Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. At 77.

III

The Federal Gun Control Act has a provision which is almost identical to that involved in *Colonnade, supra.* The Section, 18 U.S.C. § 923(g), provides *inter alia:*

> The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition * * * dealer * * * for the purpose of inspecting or examining (1) any records or documents required to be kept * * * and (2) any firearms or ammunition kept or stored by such * * * dealer. * * *

The government would distinguish *Colonnade* because there the agents used force and broke down a door to enter the liquor storeroom. It argues that here the appellant consented. We cannot agree. The prosecutor puts too much reliance on the appellant's "[i]f that is the law, I guess it is all right." This "consent" is similar to that found ineffective in *Bumper* v. *North Carolina,* 391 U.S. 543 (1968), where Mr. Justice Stewart in writing for the Court said:

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. * * * When a law enforcement officer claims authority to search a home under a warrant, he announces

in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit allowably lawful coercion. Where there is coercion there cannot be consent." At 548–550.

We, therefore, conclude that *Colonnade, See,* and *Bumper, supra,* are conclusive of this issue and we are obliged to hold that the statute insofar as it authorizes entry by the Secretary or his delegate without a warrant and without the owner's permission is unconstitutional, and that the evidence seized thereby must be suppressed. The judgment is, therefore, REVERSED.

APPENDIX B

May Term—May 18, 1971

Before Honorable Tom C. Clark, Associate Justice, United States Supreme Court, retired; and Honorable Thomas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges.

No. 464–70

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LOARN ANTHONY BISWELL, DEFENDANT-APPELLANT

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is reversed.

HOWARD K. PHILLIPS,
Clerk.

By HELEN R. BARTHA,
Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1971

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 28 1971
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL, RESPONDENT

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WARREN F. REYNOLDS
OF EASLEY & REYNOLDS

Post Office Box 638
Hobbs, New Mexico 88240

regular course of business he makes loans on guns owned by individuals. (Record, Vol. III, pp. 85, 87, 88, 167) From two different individuals he made loans on two single shot twenty-two caliber rifles which were shortened so as to fall within the definition of "firearms" under the Federal Gun Control Act. (Record, Vol. III, pp. 67, 77, 88, 89, 90, 91)

The individuals pawning the two short guns with respondent had not registered them nor applied for a transfer to respondent as required by the Federal Gun Control Act. Furthermore, the two short guns were not identified by a serial number as required by the Federal Gun Control Act. Neither the owners of the guns nor respondent applied for such serial numbers. There was no discussion between the owners of the guns and respondent as to the registration and need for identification numbers. (Record, Vol. III, pp. 82, 95, 96, 112, 182)

The respondent openly made the loans on the two guns in the public part of his business with other customers present. He then had the guns placed in the open in a storeroom with other pawned guns where police officers frequented before. (Record, Vol. III, pp. 69, 72, 73, 78, 79, 80, 82, 87, 88, 90, 103, 104; Vol. IV, pp. 150, 151) These were the two guns seized by Hupp.

REPLY TO REASON 1.

In reply to petitioner's contention that the inspection provision does not "...dilute the reasonableness standard of the Fourth Amendment" respondent first objects to petitioner's insertion

of alleged facts not of record in the Court below. None of the facts stated in Reason 1, with the exception of the location of the magistrate in Carlsbad is of record.

The petitioner obviously is attempting to buttress his burden below of establishing that the search was or any search under the act without a warrant is reasonable when he attempts here to make use of facts not of record. This court has held that:

> "Searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions..." Katz v. United States, 389 U.S. 347, 357 (1967)

> "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951)

It is respondent's position that in the case below the prosecution did not meet this burden. The exceptions to the need for a search warrant are where the search is incident to a valid arrest or in "exceptional circumstances" such as where violence, a moving vehicle, "...or imminent destruction, removal or concealment of the property intended to be seized..." is involved. United States v. Jeffers, Supra at 52; See Johnson v. United States, 333 U.S. 10 (1948)

In the case at bar no arrest was being made at the time of the search nor were there any facts bringing the search without a warrant within the other exceptions. There was no emergency and as in United States v. Jeffers, Supra the officers "could have easily prevented any... destruction or removal [of illegal guns] by merely guarding the door." This is equally true of any search under the act where none of the exceptions are present.

As in Johnson v. United States, Supra the only reasons offered for not obtaining a search warrant is inconvenience to the officers and implementation of the program in the act. In reference to inconvenience this court in the Johnson case stated that:

> "These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement."

As for implementing the program under the act of controlling misuse of firearms, the same sort of argument in Colonnade was turned down by this court.

Petitioner in Reason 1 also attempts to justify warrantless inspections under the Federal Gun Control Act as not diluting the reasonableness standard of the Fourth Amendment because it only authorizes "...inspections...of particularized items on the dealer's premises during business hours." In its argument petitioner overlooks the "Plain View Doctrine," that is, although the officer's original entry is limited to inspection of guns, once he is on the premises

and sights evidence of a crime that is in plain view such evidence is admissible in a prosecution for another crime. Harris v. United States, 390 U.S. 234 (1968) The protection of the Fourth Amendment that calls for search warrants to specify what items can be seized is thereby circumvented. Stanford v. Texas, 379 U.S. 476 (1965)

Furthermore, the ordinances and statutes involved in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), See v. Seattle, 387 U.S. 541 (1967) and Camara v. Municipal Court, 387 U.S. 523 (1967) which petitioner attempts to distinguish also limit inspections to the subject matter of the enactments. This was not held by this court to be a safeguard of the reasonableness standard of the Fourth Amendment.

In conclusion to respondent's reply to Reason 1 it is his position that the inspection provision of the act should not be upheld because it would constitute an errosion of the protection of the Fourth Amendment and set a dangerous precedent enabling enactment of other ordinances and statutes with inspection provisions that would do away with the need of a search warrant in all walks of life. See Smith v. Allwright, 321 U.S. 649 (1944)

REPLY TO REASON 2.

In Reason 2 petitioner attempts to narrow this court's holding in Colonnade Catering Corp. v. United States, Supra to that of an unreasonable search and seizure because Congress "...had not

authorized forcible entries without a warrant..." Actually this court's broad holding was that:

> "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. At 77."

As in Colonnade, Congress in the Federal Gun Control Act has "...made no rules governing the procedure that inspectors must follow." Lacking them, the inspectors must obtain a search warrant unless the gun dealer voluntarily consents to the inspection. Even if the holding in Colonnade was restricted narrowly as petitioner argues, it would be applicable in the case at bar. As in Colonnade, Congress in the Federal Gun Control Act did not authorize forcible, warrantless entries. A coerced entry is not any more legal than a forced entry. Bumper v. North Carolina, 391 U.S. 543 (1968)

In conclusion to respondent's reply to Reason 2, it is his position that Colonnade is not distinguishable and should apply in this case. Colonnade stood for the proposition that there must be reasonable provisions within the act authorizing inspections to safeguard the constitutional right of a proprietor from unreasonable search and seizure. That neither in Colonnade nor in the case at bar are there reasonable safeguards. Lacking them, the only remedy stated in Colonnade would be a search warrant.

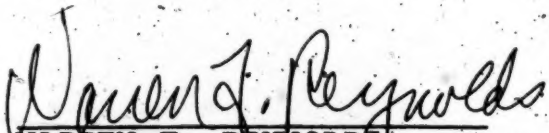
REPLY TO REASON 3.

Petitioner's argument in Reason 3 necessarily depends upon whether or not the inspection provision in the Federal Gun Control Act did away with the need for a search warrant. Petitioner assumes that it did, therefore eliminating the element of coercion by use of an unconstitutional statute. To the contrary if the appellate court below is correct in holding "...that the statute insofar as it authorized entry by the secretary or his delegate without warrant and without the owner's permission is unconstitutional..." then the use thereof by Hupp to obtain consent to the search (Record, Vol. III) "...is instinct with coercion--albeit allowably lawful coercion. Where there is coercion there cannot be consent." Bumper v. North Carolina, Supra at 548-550.

CONCLUSION

In view of the aforesaid, it is respectfully submitted that the writ of certiorari should not be granted, and the judgment of the Court of Appeals should be confirmed.

Respectfully submitted,



WARREN F. REYNOLDS
OF EASLEY & REYNOLDS
ATTORNEYS FOR RESPONDENT

Post Office Box 638
Hobbs, New Mexico 88240

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 20 1972
E. ROBERT SEAVER, CLERK

No. 71-81

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Summary of argument	6
Argument:	
I. The authority granted by Congress to Internal Revenue agents to make warrantless inspections of the business premises of licensed firearms dealers in order to examine records which are required by statute to be kept, as well as firearms kept or stored at the licensed premises, does not violate the Fourth Amendment	8
II. The inspection and seizure in this case were reasonable	19
Conclusion	21

CITATIONS

Cases:

Bumper v. *North Carolina*, 391 U.S. 543 — 20

Camara v. *Municipal Court*, 387 U.S. 523 — 7, 12, 13, 15, 16, 17, 18

Carroll v. *United States*, 267 U.S. 132 — 16

Colonnade Catering Corp. v. *United States*, 397 U.S. 72 — 6, 8, 9, 10, 18, 19

Coolidge v. *New Hampshire*, 403 U.S. 443 — 14

Davis v. *United States*, 328 U.S. 582 — 14

Katz v. *United States*, 389 U.S. 347 — 14

454-866—72——1

Cases—Continued

	Page
Mancusi v. *DeForte*, 392 U.S. 364	14
See v. *City of Seattle*, 387 U.S. 541	7
Terry v. *Ohio*, 392 U.S. 1	10, 12, 13, 15, 16, 17, 18
United States v. *Alfred M. Lewis, Inc.*, 431 F. 2d 303, certiorari denied, 400 U.S. 878	19
United States v. *Freed*, 401 U.S. 601	5
United States v. *Gross*, 313 F. Supp. 1330, affirmed November 2, 1971, No. 71-1063, C.A. 7	10
United States v. *Hofbrauhaus of Hartford, Inc.*, 313 F. Supp. 544	19
United States v. *Thriftimart, Inc.*, 429 F. 2d 1006, certiorari denied, 400 U.S. 926	19
United States v. *Wilson*, 440 F. 2d 1068	10
Warden v. *Hayden*, 387 U.S. 294	16
Zap v. *United States*, 328 U.S. 624, reversed, 330 U.S. 800	14
Constitution, statutes and regulations:	
Constitution of the United States, Fourth Amendment	6, 9
Gun Control Act of 1968 (18 U.S.C.):	
Title I and Title II	14
Section 921(a)(11)	4
Section 921(a)(12)	4
Section 921(a)(19)	4
Section 923	4
Section 923(a)(3)	2
Section 923(e)	9, 21
Section 923(f)	9, 21
Section 923(g)	2, 3, 5, 15
Section 924(a)	9
National Firearms Act, as amended (26 U.S.C.):	
Section 5801	4
Section 5841	5
Section 5845(k)	4
Section 5861(d)	5

Constitution, statutes and regulations—Continued

	Page
7 U.S.C.:	
Section 79	10
Section 243	10
Section 244	10
Section 396	10
Section 511	10
Section 581	10
Section 585	10
12 U.S.C.:	
Section 26	11
Section 483	11
15 U.S.C. 1270(b)	10
18 U.S.C., Section 843(f)	11
21 U.S.C.:	
Section 157	10
Section 374(a)	10
Section 455	10
Section 621	10
Section 1034	10
26 U.S.C.:	
Section 5275	11
Section 7342	9
29 U.S.C. 657(a)	11
30 U.S.C.:	
Section 723	11
Section 724	11
Section 813(b)	11
42 U.S.C.:	
Section 262(c)	10
Section 263i(a)	10
49 U.S.C. 1377(e)	11
26 C.F.R.:	
Section 178, Subpart H	5
Section 178.23	3, 5, 14
Section 178.121(b)	4, 5, 14

Miscellaneous:

Congressional Findings and Declaration in Notes preceding 18 U.S.C. 922 ..... Page 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 442 F.2d 1189.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on May 18, 1971. On June 9, 1971, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 17, 1971 (A. 63). The petition was filed on July 15, 1971, and was granted on December 7, 1971 (A. 64). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inspection provisions of the Gun Control Act of 1968 (18 U.S.C. 923(g)) violate the Fourth Amendment insofar as they authorize Internal Revenue Service agents to inspect without a warrant during business hours firearms and required records on the premises of a licensed dealer in firearms.

2. Whether the inspection and seizure in this case were reasonable.

STATUTE AND REGULATIONS INVOLVED

18 U.S.C. 923 (Gun Control Act of 1968) provides in pertinent part:

> (a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:
>
> * * * * *
>
> (3) If the applicant is a dealer—
>
> (A) in destructive devices or ammunition for destructive devices, a fee of $1,000 per year;
>
> (B) who is a pawnbroker dealing in firearms other than destructive devices, or ammunition for firearms other than destructive devices, a fee of $25 per year; or
>
> (C) who is not a dealer in destructive devices or a pawnbroker, a fee of $10 per year.
>
> * * * * *

(g) Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for the inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. * * *

26 C.F.R. 178.23 provides:

Any internal revenue officer may enter during business hours the premises, including places of storage, of any licensed importer, licensed manufacturer, licensed dealer, or licensed collector for the purpose of inspecting or examining any records or documents required to be kept by such importer, manufacturer, dealer, or collector under this part, and any firearms or ammunition kept or stored by such importer,

manufacturer, dealer, or collector at such premises.

26 C.F.R. 178.121(b) provides:

> Internal revenue officers may enter the premises of any licensed importer, licensed manufacturer, licensed dealer, or licensed collector for the purpose of examining or inspecting any record or document required by or obtained under this part (see § 178.23). Section 923(g) of the Act requires licensed importers, licensed manufacturers, licensed dealers, and licensed collectors to make such records available for such examination or inspection at all reasonable times.

STATEMENT

After a trial by jury in the United States District Court for the District of New Mexico, respondent was convicted of having engaged in business as a dealer in firearms, as defined in 26 U.S.C. 5845(k), without having paid the special occupational tax required by 26 U.S.C. 5801. He was sentenced to imprisonment for a period of two years (A. 2).

Respondent operated a pawnshop in Hobbs, New Mexico, and had a federal license to deal in certain kinds of firearms and ammunition;[1] he was not licensed to deal in sawed-off rifles (A. 8–10, 24, 29, 31, 47, 57). Shortly after 3:00 p.m. on February 4, 1970, special investigator Hupp of the Alcohol,

[1] He was licensed under 18 U.S.C. 923. The term "dealer" is defined in 18 U.S.C. 921(a)(11) as including a "pawnbroker." The term "pawnbroker" is defined in 18 U.S.C. 921(a)(12). It is unquestioned that respondent fell within this definition.

Tobacco and Firearms Division of the Treasury Department, accompanied by a local police officer, made a routine inspection visit to respondent's pawnshop. After inspecting respondent's records, which were not in proper form, Hupp asked to see the firearms (A. 8, 20, 28).[2]

When respondent asked whether he had a search warrant, Hupp replied that licensed premises were required to be open to inspection during normal business hours (see note 2, *supra*). At respondent's request, Hupp showed him a copy of the statute (18 U.S.C. 923(g)) which so provides. Respondent, a former policeman, read it and said, "If that is the law, I guess it is all right" (A. 8–9, 28, 35).

Hupp thereupon entered the storage room and found two fully operable sawed-off rifles, which had been pawned to respondent (A. 10, 13, 17, 22–24). Since respondent was not licensed to deal in such weapons and they were subject to the National Firearms Act,[3] the two rifles were seized. The next day a

[2] As a registered dealer, respondent was required by statute to maintain records of receipt and disposition of all firearms (18 U.S.C. 923(g); 26 C.F.R. 178, Subpart H), and to make such records available for inspection by internal revenue officers at all reasonable times (18 U.S.C. 923(g); 26 C.F.R. 178.121(b)). Furthermore, the statute (18 U.S.C. 923 (g)) and regulations (26 C.F.R. 178.23, 178.121(b)) provide that any internal revenue officer may enter the licensed business premises during business hours to inspect records, firearms and ammunition.

[3] The sawed-off rifles were not registered to respondent in the National Firearms Registration and Transfer Record as required by 26 U.S.C. 5841 (A. 36, 39, 40–41); it was therefore unlawful for respondent to receive or possess them, 26 U.S.C. 5861(d). See *United States* v. *Freed*, 401 U.S. 601, 604.

search warrant was obtained under which numerous other weapons seen in the storage room were seized (A. 10–11).

The district court, overruling respondent's pre-trial motion to suppress and his objections at trial, held the seized guns to be admissible in evidence (A. 12). The court of appeals reversed, holding that respondent had not consented to the agent's entry and that 18 U.S.C. 923(g) violated the Fourth Amendment, insofar as it authorized warrantless entry and inspection. The court concluded that since the weapons were improperly seized, their introduction at trial was reversible error (Pet. App. A).

SUMMARY OF ARGUMENT

This case presents the question whether Congress may, consonant with the requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at the firearms and required business records of a licensed gun dealer. We contend that Congress has that authority where, as here, it enacts an inspection statute narrowly limited in time, location and scope. We urge that the validity of this limited inspection scheme—which is essential to the effective control and regulation of the gun distribution business—should be sustained under the rationale of *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, since there was no forcible entry in this case. The use of forcible entry, rather than the statutorily prescribed remedy of criminal sanctions, to enforce the warrantless inspection in *Colonnade* was the sole, and

narrow, basis for the holding against the government in that case. Here, by contrast, respondent simply yielded to the authority of the statute as soon as he was made aware of its terms, just as an individual might permit a search under a valid warrant when it is served on him.

The decisions in *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, do not require invalidation of the present statute. The considerations which compelled the adoption of the warrant procedure in *Camara* and *See* are not present here. The inspection authority under the instant statute is precise and narrow and limited to business hours; it is directed at a highly regulated industry where inspection of the dealer's books and firearms is an essential element of effective regulation; and it is aimed at businessmen who know that inspection is a normal attribute of this business. In the context of the statutory purposes and statutory safeguards involved here, Congress was justified in concluding that the public interest in prompt warrantless inspection of gun dealers' premises outweighs the minimal intrusion into privacy authorized in this inspection scheme.

The remaining question is whether the inspection in this case was reasonable. It is our position that the agent acted within the scope of his authority and there was no unconstitutional compulsion. In allowing inspection, respondent simply complied with his statutory duty when it was pointed out to him.

ARGUMENT

I. THE AUTHORITY GRANTED BY CONGRESS TO INTERNAL REVENUE AGENTS TO MAKE WARRANTLESS INSPECTIONS OF THE BUSINESS PREMISES OF LICENSED FIREARMS DEALERS IN ORDER TO EXAMINE RECORDS WHICH ARE REQUIRED BY STATUTE TO BE KEPT, AS WELL AS FIREARMS KEPT OR STORED AT THE LICENSED PREMISES, DOES NOT VIOLATE THE FOURTH AMENDMENT

Just two Terms ago, this Court in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, had before it the question of the validity of a warrantless inspection scheme dealing with business premises licensed to sell intoxicating liquor. In light of the long-standing regulation of the liquor industry, the Court was of the view that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand", and that this could involve a non-warrant procedure. *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 76. The Court's decision against the government in *Colonnade* was based on a narrow issue of statutory construction (397 U.S. at 74, 77). Under the statutory scheme there involved, the Court found that Congress had not authorized *forcible* entries without a warrant to accomplish inspection. "Congress * * * resolved the issue", the Court concluded, "not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector" (397 U.S. at 77).

The basic issue in this case is whether the warrantless inspection authority recognized as valid in *Colon-*

nade with regard to the liquor industry is similarly constitutional in the comprehensive regulatory and licensing scheme Congress has applied to dealers in firearms. We urge that it is, and that under the rationale of *Colonnade* the search and seizure in the present case were valid, since no force was employed to gain entry. While it is true that respondent yielded to the authority of the statute when its terms were made known to him, this did not amount to compulsion or coercion violative of the Fourth Amendment. If, as we submit, the present inspection scheme is justified in this highly regulated industry, then the licensee here, as in *Colonnade,* had a duty to permit the inspection and comply with a lawful show of authority.[4]

In this portion of the brief we will argue that the limited, warrantless inspection scheme involved here is necessary for effective regulation of the licensed gun industry and that no countervailing Fourth Amendment interest would be served by imposing a warrant requirement. In Point II we contend that the particular inspection in this case was consonant with Fourth Amendment requirements.

---

[4] While the instant statute does not contain an equivalent of the provision of the liquor laws (26 U.S.C. 7342) specifically prescribing a fine for refusal to permit entry and inspection (see *Colonnade*, *supra*, 397 U.S. at 74), Congress has made it a crime to violate any provision of the statute (18 U.S.C. 924(a)). Moreover, a license may be revoked where the licensee violates any provision of the statute or any rule or regulation thereunder (18 U.S.C. 923(e) and (f)).

A. Neither respondent nor the court below has questioned the power of Congress to require that gun dealers obtain a federal license. Indeed, whenever this question has been raised, the power of Congress to require all firearms dealers to obtain a federal license has been sustained. *United States* v. *Wilson,* 440 F.2d 1068 (C.A. 6); *United States* v. *Gross,* 313 F. Supp. 1330 (S.D. Ind.), affirmed November 2, 1971, No. 71-1063, C.A. 7. While regulation of guns does not have the same historic antecedents as the regulation of the liquor industry involved in *Colonnade,* the importance of gun control at the present time in the Nation's history is apparent. See, *e.g.,* Congressional Findings and Declaration in the Notes preceding 18 U.S.C. 922; cf. *Terry* v. *Ohio,* 392 U.S. 1, 24, n. 21.

An essential attribute of effective gun control and licensing is that the licensing authority be authorized, as it is in the statute here, to inspect premises used in the licensed enterprise in order to ensure that the conditions of the license are honored.[5] Inspection serves

[5] Innumerable licensing and regulatory statutes provide for inspection. For example, the Secretary of Agriculture has the right to enter private premises for inspection of meat (21 U.S.C. 621); fruit (7 U.S.C. 581, 585); poultry (21 U.S.C. 455); tobacco (7 U.S.C. 511); livestock (7 U.S.C. 396); grain (7 U.S.C. 79); eggs and egg products (21 U.S.C. 1034); food warehouses (7 U.S.C. 243, 244); and places where antitoxin is manufactured (21 U.S.C. 157). The Secretary of Health, Education, and Welfare may enter and inspect (or take samples from) establishments where electronic products are manufactured or held (42 U.S.C. 263i(a)); premises where serums and vaccines are prepared (42 U.S.C. 262(c)); establishments where food, drugs or cosmetics are manufactured or held (21 U.S.C. 374(a)); and establishments where hazardous substances are manufactured (15 U.S.C. 1270(b)). Persons using denatured

the basic statutory purpose of assuring that the weapons are dispersed in a regulated, traceable manner, rather than in an indiscriminate fashion which might lead to their undetectable possession by the criminal element. This assurance of full and accurate compliance is crucial to the congressionally intended use of the regulatory scheme as an aid to law enforcement officials.[6] The regulatory system, for example, often makes it possible to trace a firearm involved in a particular crime.[7] Again, in riot situations it can be useful for law enforcement authorities to know the source of guns for the particular

---

distilled spirits are required to keep certain records and to submit to inspection during business hours by Internal Revenue officers, who are entitled to withdraw samples of such spirits (26 U.S.C. 5275). A provision virtually identical to that in the instant case applies to persons licensed to deal in explosive materials (18 U.S.C. 843(f)). Member banks of the Federal Reserve System are subject to inspection by the Secretary of the Treasury (12 U.S.C. 483) and by the Comptroller of the Currency before commencing business (12 U.S.C. 26). The Secretary of Labor and his delegates are empowered to enter places of employment to investigate safety and health conditions (29 U.S.C. 657(a)). The Secretary of the Interior has similar rights as to coal mines (30 U.S.C. 813(b)) and other mines (30 U.S.C. 723, 724). The Civil Aeronautics Board has a right of access at all times to all lands, buildings and equipment of any air carrier (49 U.S.C. 1377(e)).

[6] At the outset of its findings and declaration supporting the adoption of the regulatory scheme, Congress stated that "the purpose of this title * * * is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, * * *." See Congressional Findings and Declaration in the Notes preceding 18 U.S.C. 922.

[7] Thus the firearms used in the recent killing of a California judge and other persons were traced to their purchaser through records required to be maintained by licensees.

area and the customers of the gun dealers. Inspection fulfills this purpose. In short, the statutory scheme involved here—with its provision for inspection which is narrowly circumscribed in time, location and the objects subject to inspection—is designed to keep a legitimate watch on the movement in firearms and in that way to inhibit and curtail their illegal use. Our submission is that the requirement of search warrants in such a regulatory system would impede its effectiveness without any concomitant benefits that normally flow from the warrant procedure—and hence, that the use of warrants is not constitutionally required under the reasonableness standard of the Fourth Amendment, in this situation.

B. To substantiate these points, we turn first to the decisions in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, which involved municipal housing and fire code inspections and imposed search warrant requirements in those situations. The Court's opinions in those cases indicated that three basic considerations are critical in determining whether warrants are constitutionally required in the code-inspection context—*viz.*, the demands of privacy, the public need for warrantless searches, and the standards to be employed in issuing warrants. Here, we submit, these considerations support the validity of the warrantless gun inspection procedures which Congress has authorized.

Of critical concern to the Court in *Camara* and *See* was the danger that the broad inspection authority exercised in those cases gave too much discretion to

the officers in the field and too little protection to individuals who might have only a minimal awareness of their rights. As stated by the majority in *Camara* (387 U.S. at 532–533):

> * * * Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. * * * The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. * * *

A similar concern was expressed in *See, supra,* 387 U.S. at 543.

An entirely different situation is presented here. In contrast to the typical homeowner or typical businessman, the gun dealer is engaged in a business which is subject to pervasive regulation. Nor is he required to apprise himself of a broad range of regulations only tangentially related to his business; he is required only to know the restrictions and conditions which have been placed specifically on the possession and sale of guns. As a dealer, he has voluntarily sought and obtained a license. When a revenue agent, making a routine inspection, presents his identifica-

tion at the business premises during business hours, and expressly requests access to an area made available to him by statute to inspect the dealer's firearms, the dealer is hardly in a position to claim that he is unaware of the nature and scope of the inspector's authority. Nor is he required to rely upon the revenue agent's statement of his authority and its scope since he is periodically advised of the inspection authority by the Internal Revenue Service.[8]

It is thus apparent that a gun dealer can have no reasonable expectation of freedom from government inspection without warrant of his firearms. Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 369; *Katz* v. *United States*, 389 U.S. 347, 351.[9] Correspondingly, there is only minimal danger that the Internal Revenue inspector will misapply his specific and limited authority and instead conduct a general, exploratory search. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443,

[8] The Secretary is required to furnish each licensee with an annually revised compilation of public ordinances (18 U.S.C. 921(a)(19)). This document contains both Title I and Title II of the Gun Control Act of 1968 and dealers therefore are apprised of the right of entry and inspection during business hours. The applicable regulations (26 C.F.R. 178.23 and 178.121(b)) also spell out the "Right of Entry and Examination."

[9] An alternative articulation is that by engaging in this highly regulated business with full knowledge that the business records, ammunition and firearms may be subject to periodic inspection, the licensee is in substantially the same position as if he had specifically agreed to these inspections as a condition for doing business. Cf. *Zap* v. *United States*, 328 U.S. 624, 628, reversed on other grounds, 330 U.S. 800; see also *Davis* v. *United States*, 328 U.S. 582.

467. His narrow authorization (to inspect guns and required business records on the premises of a gun dealer during business hours), coupled with the dealer's knowledge of this limited authority, does not have the potential for abuse which might require the intervention of a magistrate before the fact.

Indeed, the magistrate asked to issue a warrant authorizing inspection of a gun dealer's premises could do no more than is presently done by statute. In the vast majority of cases, he could be presented with no information on which to base a more reasoned judgment than that exercised by the agents themselves, and he would reasonably limit the scope of the inspection to those locations and times already specified in 18 U.S.C. 923(g). In this statutory context, therefore, Congress was justified in concluding that the competing ends of privacy of the individual dealer and effective protection of the public will best be served by testing the validity of any particular inspection after the fact rather than requiring the prior approval of a magistrate.

The second pertinent area of inquiry specified in *Camara* and *See*—"whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara, supra*, 387 U.S. at 533)—also supports the reasonableness of the present statutory scheme. Congress was dealing here with easily movable objects, ammunition and guns, which can be readily secreted or moved while a warrant is being sought. Thus, if warrants were required to be

sought only after entry is refused as suggested in *Camara, supra,* 387 U.S. at 539, the essential governmental purpose would be in real danger of frustration. The dealer who is skirting the law would almost surely utilize the time thereby afforded to conceal any infractions. This is of particular concern in regulation of the firearms business where unauthorized concealment and uncontrolled movement of weapons can seriously endanger the public.[10]

If, on the other hand, warrants were required to be obtained here in advance of inspection because "surprise" is "a crucial aspect" (*See, supra,* 387 U.S. at 545 n. 6), there would, in effect, be an automatic warrant requirement even though most licensees would have no objection to inspection. The result would be needless consumption of limited manpower,[11] with a tendency to antagonize the law abiding dealers. We submit, therefore, that in light of the minimal additional safeguard of any right of privacy that warrants

[10] The special nature of this business thus suggests an analogy to other situations where the circumstances permit enforcement officers to act without a warrant, such as the search of a movable vehicle, *Carroll* v. *United States,* 267 U.S. 132, 153, or the search for a fleeing suspect during hot pursuit, *Warden* v. *Hayden,* 387 U.S. 294, 298–300.

[11] We are informed by the Internal Revenue Service that there are approximately 144,000 licensees presently registered under the Act, who are subject to inspection by fewer than 1,600 agents of the Alcohol, Tobacco and Firearms Division. These manpower limitations are compounded by the circumstance that many of the licensees are located in rural areas. In the present case, for example, it would have been necessary to go to Carlsbad, New Mexico, at the far end of the next county, in order to locate a magistrate (A. 36–37).

would provide, the substantial disadvantages of using a warrant procedure in this field justify Congress' authorization of limited inspection of the premises of gun dealers without warrants.

The third consideration discussed in *Camara* and *See* was the standards to be employed in determining whether to issue warrants. In those cases, the reasonableness of searches was dependent principally on the passage of time since the last previous inspection and the physical conditions of the general area. (see *Camara, supra,* 387 U.S. at 535–538). These considerations have only limited relevance to the situation here. The physical conditions in the general area are unrelated to the need to inspect the premises of a dealer in guns; nor is the passage of time of crucial significance here.[12] Among other factors, manpower availability, the peculiar conditions of local regions (such as geographic dispersion of dealers), the number of violations previously discovered, or a wave of criminal activity may be involved in the decision whether to inspect a particular dealer. Flexibility of approach is peculiarly appropriate to serve the objectives of the inspection provision of the statute—that is, to determine whether the gun dealer is complying with his obligations under his license. This need for flexibility suggests that a

[12] While this is but a single factor prompting inspection, we are advised by the Internal Revenue Service that an effort is made to inspect a dealer's business premises at least on a yearly basis near the time when the annual license is due to expire (see A. 26). However, as to pawnbrokers, an effort is made to inspect with greater frequency.

magistrate's role in authorizing these inspections would not be a meaningful one.[13]

C. In short, in the present case, as in *Colonnade*, the reasons underlying the warrant requirement announced in *Camara* and *See* are absent. On the contrary, the public importance of the industry being regulated, the voluntary entry of the dealer into that industry with knowledge that close inspection will be required, and the precise and narrowly circumscribed inspection authority granted by Congress all militate against a warrant requirement. What was said in *Colonnade* has even greater force in this case (397 U.S. at 76–77):

> We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See* v. *City of Seattle, supra,* at 545—"that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure"—is therefore not applicable here. In *See,* we reserved decision on the problems of "licensing programs" requiring inspection, saying they

[13] As noted in the Statement (*supra*, pp. 5–6), once the inspector had probable cause to believe that respondent was guilty of a crime, he obtained a search warrant before returning to respondent's business premises to seize other weapons. It was at this point, unlike the situation before the initial, routine inspection, that the magistrate could exercise his independent judgment concerning whether there was probable cause to believe a crime had been committed.

> can be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.*, at 546.
>
> * * * * *
>
> * * * We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry * * *, Congress has broad authority to fashion standards of reasonableness for searches and seizures. * * *

Here, too, Congress should have "broad authority to fashion standards of reasonableness" for supervision and inspection of the business of distributing guns. It has adopted an eminently reasonable scheme, one that is particularized and narrow with a minimal danger that rights of privacy will be invaded and which serves a paramount public interest. See *United States* v. *Thriftimart, Inc.*, 429 F. 2d 1006 (C.A. 9), certiorari denied, 400 U.S. 926; *United States* v. *Hofbrauhaus of Hartford, Inc.*, 313 F. Supp. 544 (D. Conn.); *United States* v. *Alfred M. Lewis, Inc.*, 431 F. 2d 303 (C.A. 9), certiorari denied, 400 U.S. 878. Accordingly, the rationale of *Colonnade*, far from supporting the decision below, stands as firm authority for the validity of the inspection statute at issue in this case.

II. THE INSPECTION AND SEIZURE IN THIS CASE WERE REASONABLE

If, as we have argued, the statute validly imposes a duty on gun dealers to permit inspection of firearms during business hours, there can be little doubt of the validity of the inspection and seizure in the instant case. Accompanied by a local officer, the inter-

nal revenue agent arrived in mid-afternoon, showed his credentials and explained his purpose; when respondent showed reluctance to permit inspection of the firearms in the storeroom, the officer allowed respondent, an ex-policeman, to read the statutory provision authorizing inspection. After respondent read the statute, he complied with his statutory duty and permitted the officers to enter his storage room and inspect the firearms. The court below held this inspection invalid on the theory that in these circumstances respondent's "consent" was "ineffective" under the rationale of *Bumper* v. *North Carolina*, 391 U.S. 543.

Bumper seems obviously inapplicable. There the officer said he had a warrant when he did not have a warrant, and the "consent" was obtained by that misrepresentation. Here there was no misrepresentation. The officer said that the law authorized a search of business premises, and showed the owner the law. There was no deception, and no coercion except that coming from the law itself. Moreover, the standards of *Bumper*, which involved a search without warrant of a private dwelling by officers seeking evidence of crime, are not addressed to, and do not govern, the present situation. We are not here dealing with a case where one has a choice either to permit or not permit a search and a warrant is required in the absence of consent. Here respondent had no unfettered choice. Having entered the gun business where inspection is authorized by statute, and is necessary for proper enforcement of the licensee's obligations, respondent

had the duty to permit inspection. Had he refused he was subject to revocation of his license. See 18 U.S.C. 923(e) and (f). It was entirely proper for the officers to point to the statute to inform the licensee of his obligation to permit inspection; correspondingly, that respondent acquiesced when his statutory obligation was made known to him was no more than compliance with his duty as a licensed dealer in firearms—fully comparable to compliance with one's duty to permit a search under a valid warrant when the warrant is made known to him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
JEROME M. FEIT,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 6 1972
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL, RESPONDENT

ANSWER TO BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WARREN F. REYNOLDS
OF EASLEY & REYNOLDS

Post Office Box 638
Hobbs, New Mexico 88240

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

V.

LOARN ANTHONY BISWELL, RESPONDENT

ANSWER TO BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WARREN F. REYNOLDS
OF EASLEY & REYNOLDS

Post Office Box 638
Hobbs, New Mexico 88240

I N D E X

	Page
Summary of argument	V
Answer to statement of the case	1
Argument:	
I. The authority granted by Congress to Treasury Agents to make warrantless inspections of the private portions of business premises of licensed firearms dealers in order to examine records which are required by statute to be kept, as well as firearms does violate the Fourth Amendment.	2
II. The inspection and seizure in this case were not reasonable because consent was coerced by an unconstitutional statute authorizing a search without a warrant and by the badges of authority of the officers.	25
Conclusion	26

CITATIONS

Cases:

Amos v. United States, 255 U.S. 313, 65 L Ed 654, 41 S Ct 266 (1920)	25
Bumper v. North Carolina, 391 U.S. 543, 20 L Ed 2d 797, 88 S Ct 1788 (1968)	VIII, 22, 25 26, 27
Camara v. Municipal Court, 387 U.S. 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967)	V, VI 3, 4, 5, 7, 8, 10, 11, 12, 15, 16, 26

Cases--Continued

	Page
Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L Ed 2d 60, 90 S Ct 774 (1970)	v, VII, 3, 4, 5, 21, 22
Cipres v. United States, 343 F 2d 95, (9th Cir. S.D. Cal. 1965), cert. denied, 385 U.S. 826, 87 S Ct 58, 17 L Ed 2d 62 (1966)	27
Frank v. Maryland, 359 U.S. 360, 3 L Ed 2d 877, 79 S Ct 804 (1959)	4, 7, 8, 9, 15, 17
Frost v. Railroad Commission, 271 U.S. 583, 70 L Ed 1101, 46 S Ct 605 (1926)	VII, 13
Go-Bart Importing Company v. United States, 282 U.S. 344, 75 L Ed 374, 51 S Ct 153, (1931)	25
Harris v. United States, 390 U.S. 234, 19 L Ed 2d 1067, 88 S Ct 992 (1968)	12
Haynes v. United States, 390 U.S. 85, 19 L Ed 2d 923, 88 S Ct 722 (1968)	23
Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948)	VIII, 6, 7, 25, 27
Katz v. United States, 389 U.S. 347, 19 L Ed 2d 576, 88 S Ct 507 (1967)	6

Cases--Continued

	Page
Mancusi v. DeForte, 392 U.S. 364, 20 L Ed 2d 1154, 88 S Ct 2120 (1968)	14
People v. Younger, 327 Mich. 410, 42 N.W. 2d 120 (1950)	15
See v. Seattle, 387 U.S. 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967)	V, 3, 4, 5, 7, 8, 11, 12, 26
Standard Airlines v. C.A.B., 177 F 2d 18, (D.C. App. 1949)	14
Stanford v. Texas, 379 U.S. 476, 13 L Ed 2d 431, 85 S Ct 506 (1965)	12
United States v. Freed, ___ U.S. ___, 28 L Ed 2d 356, 91 S Ct ___ (1971)	24
United States v. Hammond Milling Co., 413 F 2d 608, (5th Cir. Fla. 1969) cert. denied 396 U.S. 1002, 24 L Ed 2d 494, 90 S Ct 552 (1970)	14
United States v. Jeffers, 342 U.S. 48, 96 L Ed 59, 72 S Ct 93 (1951)	6
United States v. Kramer Grocery Co., 418 F 2d 987, (8th Cir. Ark. 1969)	5, 14, 26
United States v. Lefkowitz 285 U.S. 452, 76 L Ed 877, 52 S Ct 420 (1932)	26
United States v. Sinclair 321 F Supp 1074 (E.D. Mich., S.D. 1971)	5, 26

Cases--Continued

	Page
United States v. Stanack Sales Co., 387 F 2d 849 (3rd Cir. N.J. 1968)	5, 26
Statutes and regulations:	
Gun Control Act of 1968 (18 U.S.C.):	
Section 923(a)(c)(d)(e)(f)	18
Section 923(c)	8
Section 923(g)	18
National Firearms Act, as amended (26 U.S.C.):	
Section 5841	23
Section 5848(a)	24
Section 5851	23
Miscellaneous:	
3 U.S. Congressional and Administrative News, 1968, pp. 4410, 4411, 4412	9

SUMMARY OF ARGUMENT

Respondent urges that the warrantless inspection scheme under the Federal Gun Control Act of 1968 as to licensed dealer's records and ammunition is in violation of the "self protection" and privacy interests protected in the Fourth Amendment and the protection of the Fifth Amendment against self incrimination. That decisions in Camara v. Municipal Court, 387 U.S. 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) and See v. Seattle, 387 U.S. 541, 18 L Ed 2d 943, 87 S Ct 1737 (1967) require invalidation of the inspection provision of the act.

Contrary to petitioner's argument, Colonnade Catering Corp. v. United States, 397 U.S. 72, 25 L Ed 2d 60, 90 S Ct 774 (1970) is not controlling because it did not specifically authorize warrantless administrative inspections. Rather it holds that the search was unreasonable because Congress provides no safeguards to make such reasonable.

Camara v. Municipal Court, Supra and See v. Seattle, Supra should be followed because Colonnade Catering Corp. v. United States, Supra did not overrule them and they stated that administrative inspection cases should be decided on a case-by-case basis. This Court should apply the test set out in Camara and adopted in See which was not done in Colonnade.

Camara v. Municipal Court, Supra rejected warrantless administrative inspections because they do infringe on

both privacy and "self protection" interests since violations of building codes usually carry sanctions. This Court should do likewise in this case because violations of the Gun Act are felonies.

In Camara v. Municipal Court, Supra this Court only required probable cause that there were violations of building codes in the area and not in a particular house, because area inspections were the only means of implementing the code, because the inspections were made to find and correct infractions and not to gather evidence for criminal prosecution and because there was historic public and judicial acceptance of such inspection schemes.

On the other hand, inspections under the Gun Act should not be allowed unless a warrant issue based on probable cause that the dealer has not complied with the Act. Unlike building codes, enforcement of the Gun Act will not be frustrated by requiring such probable cause because Congress provides tools for implementation, such as record keeping and reports to the Secretary. Further, improper records, such as in this case should raise probable cause of other violations. Also, failure to report should do likewise, both are felonies.

Further, inspection under the Gun Act is criminal in nature rather than civil and the penalty for noncompliance is a felony conviction. It represents a serious invasion of the "self protection" interest. Also, there is no historic public and judicial acceptance of gun laws and inspections thereunder.

Even if this Court holds that probable cause that a particular dealer did not comply with the Act would frustrate the purposes of the Act, a lesser probable cause would not. Contrary to what petitioner states, length of time and crime in the area could be considered as probable cause to issue a search warrant.

To buttress his argument that a warrantless inspection is valid, petitioner in the alternative states that since respondent voluntarily sought the dealer's license knowing inspections were required, he impliedly consented to them. This is contrary to this Court's holdings that a constitutional right can't be taken in return for a privilege given by the state, Frost v. Railroad Commission, 271 U.S. 583, 70 L Ed 1101, 46 S Ct 605 (1926).

Even if this Court holds that Colonnade Catering Corp. v. United States, Supra, validated warrantless inspections in the liquor industry and they are valid as to gun dealers, there is no valid distinction between the two cases. In Colonnade this Court held that a search warrant must issue on probable cause because the statute contained no safeguards against an unreasonable search.

The Gun Act contains none either, because it forces a dealer to incriminate himself since inspection is mandatory. Although in Colonnade Catering Corp. v. United States, Supra, no suggestion was made by this Court as to what safeguards are necessary, petitioner suggests a similar safeguard as that enacted in the National Firearms Act in 1968, that is, any information or evidence secured by the

registration requirements of that Act could not be used for prosecution of prior or concurrent crimes. In the Gun Act, a similar provision could be enacted to the effect that no evidence or information obtained from an inspection could be used for prosecution of prior or concurrent crimes. This would protect the dealer's right to "self protection" and protection against self incrimination.

Respondent's consent to the inspection after the treasury agent read him the Act authorizing inspection while in the company of a local police officer was illegally coerced and not valid. Under Bumper v. North Carolina, 391 U.S. 543, 20 L Ed 2d 797, 88 S Ct 1788 (1968) this Court held that consent obtained under color of authority which later turns out to be invalid is not voluntary. Further, this Court has held consent to the authority of "color of office" is likewise coerced and not legal. Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948). That under these circumstances, respondent's consent to the inspection was not valid.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR LOARN ANTHONY BISWELL, RESPONDENT

ANSWER TO STATEMENT OF THE CASE

In answer to petitioner's Statement of the Case, respondent adds the following facts to clarify the circumstances surrounding this case.

Respondent is in the Pawn & Loan business in Hobbs, New Mexico. In the regular course of business he makes loans on guns owned by individuals. For two different individuals he made loans and gave receipts on two single-shot, twenty-two caliber rifles which were shortened. One individual received a $3.00 loan and the other a $3.50 loan. There was no

evidence that they knew the guns were illegal, nor was the respondent aware that "...a little, old single-shot rifle..." was illegal. Although respondent learned when he was a policeman that sawed-off shotguns and machine guns were illegal, he hadn't learned that about sawed-off rifles. (A.13-19, 43-47, 50-51, 58)

The respondent openly made the loans on the two guns in the public part of his business with other customers present. He then had the guns placed in the open in his storage room where police officers frequented before. The doorway to the storeroom had a sign stating, "No Admittance, employees only," This was the place that respondent did not want Hupp to inspect. These were the two guns seized by Hupp. When seized, the guns were still redeemable by the persons pawning them who planned to do so, but were prevented by the seizure. (A.9, 13-19, 28-29, 37-40, 56)

ARGUMENT

ANSWER TO POINT I

THE AUTHORITY GRANTED BY CONGRESS TO TREASURY AGENTS TO MAKE WARRANTLESS INSPECTIONS OF THE PRIVATE PORTIONS OF BUSINESS PREMISES OF LICENSED FIREARMS DEALERS IN ORDER TO EXAMINE RECORDS WHICH ARE REQUIRED BY STATUTE TO BE KEPT, AS WELL AS FIREARMS DOES VIOLATE THE FOURTH AMENDMENT

At the outset Petitioner maintains that the basic issue "...is whether the warrantless inspection authority

> search, Oklahoma Press Pub. Co. v Walling, 327 US 186, 202, 90 L ed 614, 625, 66 S Ct 494, 166 ALR 531, is subject to Fourth Amendment limitations which do not apply to actual searches and inspections of commercial premises."

It is respondent's position that since Colonnade did not specifically overrule Camara and See and did not specifically state it sanctioned warrantless inspections in such areas as the liquor industry that Camara and See control.

Camara and See have been followed in two cases since as follows: United States v. Kramer Grocery Co. 418 F 2d 987 (8th Cir. Ark. 1969)(Food and Drug Inspection); United States v. Stanack Sales Co., 387 F 2d 849 (3rd Cir. N.J. 1968)(Food and Drug Inspection); See also United States v. Sinclair, 321 F Supp 1074 (E.D. Mich., S.D. 1971)

Further, in an attempt to justify the exception being urged petitioner has stated alleged facts not of record to which respondent objects. None of the facts stated in footnotes 7, 10, 11, and 12 of petitioner's brief to justify the exception are of record except the location of the magistrate in Carlsbad. (A.36-37)

The petitioner obviously is attempting to buttress his burden below of establishing that the search was or any search under the act without a warrant is reasonable when he attempts here to make use of acts not of record. This Court has held that:

> "Searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions..." Katz v. United States, 389 U.S. 347, 357, 19 L Ed 2d 576, 585, 88 S Ct 507 (1967) (Emphasis added)

> "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51, 96 L Ed 59, 64, 72 S Ct 93 (1951)

It is respondent's position that in the case below the prosecution did not meet this burden. The recognized exceptions to the need for a search warrant are where the search is incident to a valid arrest or in "exceptional circumstances" such as where violence, a moving vehicle, "...or imminent destruction, removal or concealment of the property intended to be seized..." is involved. Id. at 52, 96 L Ed at 64; See Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948)

In the case at bar no arrest was being made at the time of the search nor were there any facts bringing the search without a warrant within the other recognized exceptions. There was no emergency and as in United States v. Jeffers, Supra the officers "could have easily prevented any... destruction or removal [of illegal guns] by merely guarding the door." Id. at 52, 96 L Ed at 69. This is equally true of any search under the act where none of the recognized exceptions are present.

As in Johnson v. United States, Supra the only reasons offered here for not obtaining a search warrant are inconvenience to the officers and implementation of the program in the Gun Act. In reference to inconvenience this Court in Johnson stated that:

> "These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." Id. at 15, 92 L Ed at 441.

Petitioner argues that guns and ammunition could be easily spirited away while awaiting a warrant. The size of objects in of themselves has never been held by this Court to create an emergency. Further, such factors as limited manpower, geographic dispersion of dealers and long distances to judges are urged by petitioner as justification for doing away with warrants. Such factors merely point to inadequacy in all areas of Federal criminal and civil enforcement. More agents and judges would solve this problem not only as to enforcing the Federal Gun Act but as to all other Federal Acts. Such factors also have never been considered by this Court in creating an exception to the need for a search warrant. Certainly, economics as a factor in limiting or taking a constitutional right should not be considered.

That leaves the question of implementation of the act and the tests provided in See and Camara.

In Camara this Court reversed the District Court's decision which was based on the authority of Frank v. Maryland,

Supra. Camara discussed the factors in Frank which persuaded the majority to rule as it did and rebutted them as follows:

First, Frank stated that since the inspector under a building code is not making a search for evidence of a criminal nature which could cause the occupier's criminal conviction, "...historic interests of 'self protection' jointly protected by the Fourth and Fifth Amendments..." are not involved, only the lesser interest of personal privacy. Camara v. Municipal Court, Supra at 530, 18 L Ed 2d at 936.

Camara stated that it disagreed with the majority in Frank that Fourth Amendment interests at stake in investigative cases are merely "peripheral." Id. at 530, 18 L Ed 2d at 936. That a law abiding citizen has as much right as a suspected criminal to limiting circumstances under which the sanctity of his home is broken. This Court in See adopted the views in Camara to apply to private areas of a place of business such as respondent's.

Further, the Court in Camara stated that such inspections "...do in fact jeopardize 'self protection' interests...", Id. at 531, 18 L Ed 2d at 936, since most building codes are subject to criminal sanctions which can be discovered by inspections. This applies even more so to this case because unlike the building codes in Camara and See which involve misdemeanors for infractions, violations of the Federal Gun Act are made felonies, that is up to five years imprisonment or up to a $5,000.00 fine or both. 18 U.S. C. 923(c). The act is criminal in nature. It is even listed in the code under

"Crimes and Criminal Procedure". This is manifested further by legislative history of the act which states that the principal purpose of the Gun Control Act of 1968

> "...as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders."

and give the general statement that

> "The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic."

3 U.S. Congressional and Administrative News, 1968, pp. 4410, 4411, 4412.

Next, Frank justified warrantless administrative searches because they are hedged with safeguards such as an inspector must display proper credentials inspect at reasonable times and may not enter by force unless there is an emergency; and at any rate his decision to

enter must comply with the constitutional standard of reasonableness. In Camara this was rejected because when the inspector demands entry the property owner has no way of knowing the lawful limits of his power to inspect and whether he is acting under proper authority.

In this case the petitioner argues that this is not applicable to licensed gun dealers because they are furnished the law and regulations by the Secretary. Respondent believes there is no valid distinction from the facts in Camara. In that case the inspector was required to present proper credentials. Further, the inspection provision required apartment house owners to pay an annual license fee in part to defray periodic inspections; that they had to have this license before they could obtain a permit of occupancy which prescribed the apartment units a building can contain.

Certainly an apartment house owner by having to pay for a license which defrays costs of inspection before he can obtain a permit of occupancy is as well aware of the law involved as a gun dealer. Further, we are all presumed to know the law. On the other hand the average citizen is not presumed to be able to interpret and apply the law and specifically, in this case the limits of the power to search and whether or not it is being conducted under proper authority. Only a lawyer or a judge versed in the law is expected to be able to do this. In the words of Camara, these questions can be reviewed by an unbiased magistrate without frustrating the basic agency reasons for inspection, if reasonable.

In Camara this Court stated that only by refusing inspection and risking a criminal conviction for such refusal can the occupant challenge the decision to inspect. If convicted because of the refusal, he may never learn any more than that the law allows entry to inspect. There is no distinction in the case at bar. As pointed out by the petitioner, refusal to allow inspection would be a violation of the Federal Gun Act, subjecting the dealer to a felony conviction. If he had been convicted of that, he might never have learned any more than that the law allows entry to inspect. Further, he might never have learned if the inspector's decision to enter complied with the constitutional standard of reasonableness unless he challenged his conviction as in Camara and See.

In the words of Camara, "The practical effect of this system is to leave the occupant to the discretion of the official in the field." The Court said this is the very discretion it has "...consistently circumscribed by a requirement that a disinterested party warrant the need to search. Id. at 532-533, 18 L Ed 2d at 937. That in the administrative search area statutory safeguards are no substitute for review by a Court; especially, "...when these safeguards may only be invoked at the risk of criminal penalty." Id. at 533, 18 L Ed 2d at 937. This is what respondent faced in this case.

Thus petitioner's argument that there is only minimal danger because of statutory safeguards in the Federal Gun Act limiting the agent to inspect guns and required business records on the premises during business hours is not

valid since respondent was subject to felony convictions which was the result in this case and since it is contrary to this Court's holding in Camara and See.

Further, petitioner overlooks the "Plain View Doctrine," that is, although the officer's original entry is limited to inspection of guns and records once he is on the premises and sights evidence of a crime that is in plain view such evidence is admissible in a prosecution for another crime. Harris v. United States, 390 U.S. 234, 19 L Ed 2d 1067, 88 S Ct 992 (1968). The protection of the Fourth Amendment that calls for search warrants to specify what items can be seized is thereby circumvented. Stanford v. Texas, 379 U.S. 476, 13 L Ed 2d 431, 85 S Ct 506 (1965)

Furthermore, the ordinances and statutes involved in See v. Seattle, Supra and Camara v. Municipal Court, Supra which petitioner attempts to distinguish also limit inspections to the subject matter of the enactments. In Camara right to inspection is limited to reasonable times. These limitations were not held by this Court to be a safeguard of the reasonableness standard of the Fourth Amendment.

Petitioner buttresses his argument in this area by stating that respondent voluntarily sought and obtained a gun license and, therefore, can't expect freedom from inspection without a warrant. Respondent points out that he dealt in guns prior to 1968, the year the Federal Gun Act was enacted. (A.58) He didn't voluntarily buy a licence. He had to in order to continue to sell guns. Further, Camara is not distinguishable since an apartment

house owner had to buy a license before he could get an occupancy license.

Petitioner, in fact, argues in the alternative that since respondent "voluntarily sought and obtained a license" with knowledge that the firearms were subject to inspection he impliedly consented to "...inspections as condition for doing business."

This is contrary to decisions of this Court as to licensing away of other constitutional rights. In Frost v. Railroad Commission, 271 U.S. 583, 593-594, 70 L Ed 1101, 1104, 46 S Ct 605 (1926) this Court said

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."

> "If the state may compel the surrender of one constitutional right as a condition of its favor it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution of the United States may thus be manipulated out of existense."

Further, the U. S. Court of Appeals for the District of Columbia stated in

Standard Airlines v. C.A.B., 177 F 2d 18, 20 (D.C. App. 1949) that, "The government cannot make a business dependent upon a permit and make an otherwise constitutional requirement a condition to the permit." See also, United States v. Hammond Milling Co., 413 F 2d 608, 612 (5th Cir. Fla. 1969) cert. denied 396 U.S. 1002 (1970): "No warrantless search is forced upon an individual or a factory."

More specifically, this Court had held that even though premises are subject to inspection or regulation this does not remove them from the Fourth Amendment protection. Mancusi v. DeForte, 392 U.S. 364, 372, n.11, 20 L Ed 2d 1154, 1161, 88 S Ct 2120 (1968), where Mr. Justice Harland pointed out for the Court:

> "The Court's opinion in Davis v. U.S., 328 U.S. 582, does contain dicta to the effect that there is a lesser right to privacy when the government officials have a 'right' to inspect the seized items. See, e.g., id., at 593. However, the only holding in Davis was that there had been a valid consent to the search; the case 'did not involve a search warrant issue'. See v. Seattle, 387 U.S. 541, 545, n.7" See also U.S. v. Kramer Gro. Co., 418 F 2d 987 (9th Cir. 1969).

In Mancusi the Court rejected the contention that the records seized were not entitled to Fourth Amendment protection as they belonged to the labor union (not to Deforte, the union official from whom they were seized) and were thus subject to government inspection.

If credence is given to petitioner's argument, dangerous precedence would be created for local, state and federal legislation licensing away the constitutional right under the Fourth Amendment. The Supreme Court of Michigan aptly stated in People v. Younger, 327 Mich. 410, 42 N.W. 2d 120 (1950):

> "Under Michigan law a man may not marry a wife, operate a motor vehicle on the highways, practice law, or a number of other things, without a license from the state. May the legislature condition the granting of such licenses upon the applicant's waiver of his constitutional rights against unreasonable search of his home, marital chamber, automobile, law office, or other place where a licensed activity occurs?"

Next, the Court in Frank stated public interest demanded such warrantless administrative searches. The Court in Camara countered by stating that:

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate

> the governmental purpose behind the search." (Emphasis added) Id. at 533, 18 L Ed 2d at 938

Although Camara rejected the appellant's argument that before a search warrant is issued, there should be probable cause that the particular house to be searched contains a violation because such a requirement would frustrate the purpose of the code, it held that in cases not involving a criminal investigation

> "In determing whether a particular inspection is reasonable--thus in determing whether there is probable cause to issue a warrant for that inspection--the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." Id. at 535, 18 L Ed 2d at 939

That since it was unanimously agreed that the only effective way of enforcing the code was by "routine periodic inspections of all structures" in an area, all that was needed for issuance of a warrant to allow inspection was probable cause to believe that all houses in the area could have defects.

The reasons given by Camara for not requiring probable cause that the occupant had committed a violation were that:

1. The inspection was unlike a criminal investigation since its purpose was to secure city wide compliance; that it was not personal in nature nor aimed at discovery of evidence of crime and only involved limited invasion of privacy.

2. Public interest demands that all dangerous conditions be prevented or removed, even unintentional ones.

3. It is unanimously agreed that the only way to enforce the code is by periodic inspection of all buildings; that it is doubtful any other technique would work.

4. Inspection provisions in building codes have a long history of public and judicial acceptance.

It is respondent's position that unlike the building code, for an inspection to be reasonable under the Federal Gun Act, there should be probable cause that the dealer is not complying with the act before a search warrant issue. The inspection provision in the Federal Gun Act is distinguishable as it is aimed at evidence of a crime since all violations are felonies. It is not impersonal in nature with the primary interest of preventing even unintentional violations as is found in building codes. It does involve a significant invasion of the "self protection" interest guaranteed by the Fourth and Fifth Amendments since it forces self incrimination of the commission of felonies. This danger was even noted in Frank v. Maryland, Supra.

Unlike building codes and liquor codes, inspection provisions in gun control acts, let alone the acts themselves, have not had long historical acceptance by the public and judiciary. In fact, this Court can take judicial notice of the up cry

that arose against the Federal Gun Act when it was proposed to the Congress in 1968. It is a dilution of the right of a citizen to keep and bear firearms guaranteed not to be infringed upon in Amendment II of the Constitution of the United States and a restriction on the long followed tradition and practice in the United States of citizens bearing arms for protection and sporting purposes.

Finally, as for public interest, there is no doubt that there is great need for insuring that gun dealers comply what with the increase in crime rate and the misuse of firearms in recent years. On the other hand, Congress has given the treasury department tools with which to work with that should cause compliance without resort to warrantless searches without probable cause. The act requires the keeping of records and reports to the treasury department. 18 U.S.C 923 (g)

Further, the act requires careful screening of all applicants for gun dealer licenses. 18 U.S.C 923 (a)(c)(d)(e)(f). Therefore, Congress contemplated that only honest, law abiding citizens receive licenses to insure compliance. It is an anomaly that once such citizens receive licenses they are then presumed to be highly suspect of engaging in illegal traffic of guns so that warrantless searches without probable cause are necessary to insure that they don't engage in such activities. This is in effect a presumption that they are guilty of such acts until they are proven innocent by inspections which is in direct opposition to the basis of our Anglo-Saxon jurisprudence of criminal law that a man is innocent until proven guilty. Further, such legislation

does in effect what this Court has prohibited as noted before, take away a constitutional right for the privilege, so called, to deal in guns.

Also, it assumes that the average dealer will refuse inspection of records and guns which is doubtful. No evidence of this was introduced in the Court below. In balancing the rights of gun dealers to privacy and "self protection" with the interest of the public of compliance with the Gun Act, the few instances of refusal would only cause minimal frustration of enforcement of the act.

To the contrary, under the Gun Act, the requirement of sufficient probable cause that the dealer has not complied with the act as determined by a magistrate before issuing a search warrant will not frustrate the purpose of the act. As noted before, records must be kept available and reported on. If as in this case, the dealer's records weren't properly kept, this being the first inspection for a year since enactment of the Act in 1968, such would be probable cause for an inspection. (A.9, 26-27, 45) Without proper records, complying and tracing are frustrated and would be reasonable grounds for a warrant for inspection of guns and ammunition.

Further, if a dealer failed to send in reports, then this also should be probable cause for a warrant issued for inspection. Such refusal or failure would again be a frustration of the goals of the act.

Finally, all instances of improper records and failure to submit reports on them would be crimes since the statute and regulations in respect thereto are

mandatory. As noted by petitioner, all violations of the act and regulations are felonies. This would enable an arrest warrant issued and a search of the dealer's premises incident to the arrest and crime charged, as could have been done in the case at bar since respondent's records were improper. Also, since a crime had been committed, this would create probable cause that in connection with that crime, other crimes concerning guns themselves had been committed.

Even if this Court holds that there need be no probable cause to believe that the individual gun dealer had not complied, respondent's position is that contrary to petitioner's argument, a warrant should be required on at least probable cause that dealers in the area are not complying.

In the case at bar the petitioner argues that unlike inspections under building codes, there are no factors that a magistrate could consider to determine whether an inspection would be reasonable and is needed in order to implement the reasonable goals of the act. That such factors as passage of time and condition of the neighborhood would not establish probable cause that a particular gun dealer was not complying. That the Secretary or his agent need random and surprise inspections without exercising discretion as to probable cause to implement the objectives of the act. Respondent disagrees because periodic inspections would detect whether or not the dealer was complying with the act. In fact Huff testified that the treasury agents try to contact a dealer at least once a year. (A.26) Also contrary to what petitioner argues, a wave of criminal activity in the dealer's

locality and prior violations on the part of the particular dealer would be considerations relevant to whether probable cause existed for issuance of a warrant.

In this case the facts that this was the first inspection a year after the enactment of the act and that respondent's records were inadequate could be considered as probable cause of possible violations including unintentional ones since his records had never been reviewed. (A.9, 26-27, 45)

What the petitioner advocated is just the situations the Fourth Amendment prohibits--unrestricted harassment and invasion of privacy at the whim of the Secretary and his agent, without probable cause that the purposes of the act are not being complied with.

Even if this Court holds that Colonnade Catering Corp. v. United States, Supra held that warrantless inspection with regard to the liquor industry can be constitutional and that under the same principles they can be constitutional as to dealers in firearms, as in Colonnade the Gun Dealer Act in its present form does violate the Fourth Amendment.

As noted before, petitioner attempts to narrow this Court's holding in Colonnade to that of an unreasonable search and seizure because Congress "...had not authorized forcible entries without a warrant..." Actually this Court's broad holding was that:

"Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and

its various restrictive rules apply." Id. at 77, 25 L Ed 2d 64

Thus it is respondent's position that Colonnade stood for the proposition that there must be reasonable provisions within the act authorizing inspections to safeguard the constitutional right of a proprietor from unreasonable search and seizure. The true basic issue before this Court is whether there are reasonable provisions within the Federal Gun Control Act for inspection of guns stored in a private storeroom on the business premises without a warrant.

It is petitioner's position that as in Colonnade, Congress in the Federal Gun Control Act has "...made no rules governing the procedure that inspectors must follow." Lacking them, the inspectors must obtain a search warrant unless the gun dealer voluntarily consents to the inspection. Even if the holding in Colonnade was restricted narrowly as petitioner argues, it would be applicable in the case at bar. As in Colonnade, Congress in the Federal Gun Control Act did not authorize forcible, warrantless entries. A coerced entry is not any more legal than a forced entry. Bumper v. North Carolina, 391 U.S. 543, 20 L Ed 2d 797, 88 S Ct 1788 (1968). Further argument on why there was a coerced entry in this case is contained in respondent's answer to petitioner's Point II.

Although this Court in Colonnade v. United States, Supra offered no examples of what reasonable provisions could be included in the act to safeguard a proprietor from unreasonable search and

seizures, respondent suggests the following:

A provision similar to the one enacted in 1968 amending the National Firearms Act could be provided in the Federal Gun Act.

The National Firearms Act prior to 1968 was condemned by this Court in Haynes v. United States, 390 U.S. 85, 98, 19 L Ed 2d 923, 933, 88 S Ct 722 (1968) as unconstitutional because compliance with the act by registering a firearm was self incriminating. That a claim of privilege against self incrimination is a full defense under 26 U.S.C. 5841 for failure to register a firearm or under 26 U.S.C. 5851 for possession of an unregistered firearm. This Court's reasoning was that the registration section forces the defendant to incriminate himself in that he would be admitting he possessed an unregistered firearm.

In this case the respondent is in the same position. By obtaining a dealer's license he submits himself to required warrantless inspections. He is on the horns of a dilemma. If he refuses, he is subject to a felony conviction. If he consents, he is subject to felony convictions for any infractions of the act. The mandatory inspection section forces the dealer to incriminate himself, thus making the search unreasonable.

To get around the holding in Haynes v. United States, Supra, Congress amended the National Firearms Act in 1968 by providing:

> "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a

natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall...be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." 26 U.S.C. 5848 (a)

This Court in United States v. Freed, U.S. ___, 28 L Ed 2d 356, 91 S Ct ___ (1971) held that the National Firearms Act no longer violated the self incrimination clause in the Fifth Amendment because the information obtained through registration could not be used in prosecution for prior or concurrent offenses.

Thus it is respondent's position that as in the National Firearms Act prior to 1968 the Federal Gun Act does violate the Fourth and Fifth Amendments. By requiring the dealer to submit to an inspection under threat of a felony conviction, it forces him to incriminate himself in violation of the Fifth Amendment. This in turn violates the Fourth Amendment because by forcing him to incriminate himself, the search and seizure are unreasonable. The only reasonable provision which could be included in the act would be one of similar wording to that included in the National Firearms Act; that is any and all information and evidence secured from an inspection of a dealer's records and guns and ammunition cannot be used against him in prosecution for prior or concurring offenses. That at the most, he be subject

to a revocation after a fair hearing for infractions discovered in the inspection. This would satisfy implementation of the purposes of the act and insure that the dealer's constitutional right to "self protection" and right against self incrimination are safeguarded.

ANSWER TO POINT II

THE INSPECTION AND SEIZURE IN THIS CASE WERE NOT REASONABLE BECAUSE CONSENT WAS COERCED BY AN UNCONSTITUTIONAL STATUTE AUTHORIZING A SEARCH WITHOUT A WARRANT AND BY THE BADGES OF AUTHORITY OF THE OFFICERS

Petitioner's argument in Point II necessarily depends upon whether or not the inspection provision in the Federal Gun Control Act did away with the need for a search warrant. Petitioner assumes that it did, therefore eliminating the element of coercion by use of an unconstitutional statute.

Obviously, if Sec. 923 is unconstitutional, then it cannot be said that the respondent voluntarily waived his right to a search warrant when induced by the authority of an unconstitutional piece of legislation. This Court has stated on many occasions that acquiescence to the claim of lawful authority is not a voluntary consent to search and seizure without a warrant. Bumper v. North Carolina, Supra; Johnson v. United States, 333 U.S. 10, 92 L Ed 436, 68 S Ct 367 (1948); Amos v. United States, 255 U.S. 313, 65 L Ed 654, 41 S Ct 266 (1920); Go-Bart Importing Company v. United States, 282 U.S. 344, 75 L Ed 374, 51 S Ct 153 (1931);

United States v. Lefkowitz, 285 U.S. 452, 76 L Ed 877, 52 S Ct 420 (1932); in inspection cases as to coercement of consent see United States v. Stanack Sales Co., Supra; United States v. Kramer Grocery Co., Supra; See also United States v. Sinclair, 321 F Supp 1074 (E.D. Mich., S.D. 1971)

In Bumper v. North Carolina, Supra this Court stated:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justifed on the basis of consent if it turns out that the warrant was invalid..." Id at 548-549, 20 L Ed 2d at 802

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion--albeit colorably lawful coercion. Where there is coercion there cannot be consent." (Emphasis added) Id. at 550, 20 L Ed 2d at 802

Furthermore, in this case the consent to entry to the private storeroom is also tainted by the fact it was given to Hupp, a treasury agent, not a mere building inspector as in Camara and See, and local

police officer with whom respondent was familiar. (A.19-20, 28, 38-39)

This Court and other Federal Courts have also condemned consents to searches as coerced when gained by officers of the law "...under color of office," Johnson v. United States, Supra at 13, and "'under color of the badge'". Cipres v. United States, 343 F 2d 95, 98 (9th Cir. S.D. Cal. 1965), cert. denied, 385 U.S. 826, 87 S Ct 58, 17 L Ed 2d 62 (1966)

In Johnson v. United States, Supra at 13 this Court said:

> "It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."

Thus, in the case at bar it is respondent's position that under the facts, he was coerced into consenting to the search of the storeroom where the two guns were found and seized. When the agent informed him that under the law he was authorized to inspect the storeroom, respondent believed him and acquiesced to the search. Liken to an invalid search warrant, authority under the statute to inspect the storeroom, "cannot later be justified on the basis of consent if it turns out the...(statute) was invalid". Bumper v. North Carolina, Supra at 549, 20 L Ed 2d at 802. Further, he was faced with two law enforcement agents to whose authority he submitted.

CONCLUSION

In view of the aforesaid, it is respectfully submitted that the judgment

of the Court of Appeals should be affirmed.

Respectfully submitted,

WARREN F. REYNOLDS
of EASLEY & REYNOLDS

ATTORNEYS FOR
RESPONDENT

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-81.

Supreme Court, U. S.
FILED
MAR 23 1972
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

LOARN ANTHONY BISWELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

JOHN S. EDMUNDS
Suite 908, Castle & Cooke Bldg.
Financial Plaza
Honolulu, Hawaii 96813

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

INDEX

PAGE

Interest of *Amicus Curiae* 1

I. Introduction and summary of argument 2

II. The warrantless inspection provisions of 18 U.S.C. Section 923(g) significantly invade the Fourth Amendment privacy interests of the class of inspectees covered by the statute; since less drastic alternatives are available to accomplish the statutory objectives (within the framework of a warrant procedure) such inspections are unconstitutional 4

A. The relevance of the *Colonnade* case 5

B. The Government has shown no necessity for the warrantless searches 7

C. Requiring a warrant would significantly advance privacy interests 10

III. Assuming *arguendo* this Court interprets 18 U.S.C. Section 923(g) to authorize warrantless administrative searches and agrees to sanction invasion of the licensee's privacy interest, *amicus* urges that the licensee's self-protection interest, guaranteed under the Fourth and Fifth Amendments, must be preserved. Evidence found during such an inspection should not be admissible for any purpose; indeed, the theory in permitting warrantless administrative inspections has as its premise that nothing found during the search can be used to incriminate the inspectee 13

IV. Conclusion 20

Table of Authorities

PAGE

Cases:

Abel v. United States, 362 U.S. 217 (1960) 16

Boyd v. United States, 116 U.S. 616 (1886) 13, 18

Camara v. Municipal Court, 387 U.S. 523 (1967) 1, 4, 6, 7, 8, 10, 14, 15, 16

Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970) 5, 6, 10

Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed.2d 564 (1971) 9

Feldman v. United States, 322 U.S. 487 14

Frank v. Maryland, 359 U.S. 360 (1959) 2, 3, 9, 10, 12, 13, 14, 15, 16

Frost v. Railroad Commission, 271 U.S. 583 (1926) 15

Haynes v. United States, 390 U.S. 85 (1968) 15, 19

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) 18

Santobello v. New York, —— U.S. ——, 40 USLW 4076 (1971) 8

See v. City of Seattle, 387 U.S. 541 (1967) 1, 6, 7, 10, 15, 16

Ullman v. United States, 350 U.S. 422 14

PAGE

Constitutional Provisions:

United States Constitution

Fourth Amendment 1, 2, 3, 4, 6, 8, 9, 10, 12, 13, 15, 18, 19

Fifth Amendment 4, 13

Sixth Amendment 8

Statutes:

18 U.S.C. §923 11

18 U.S.C. §923(e) 5

18 U.S.C. §923(f) 5

18 U.S.C. §923(g) 2, 4, 5, 6, 10, 11, 13, 19

18 U.S.C. §924 12

18 U.S.C. §924(a) 5

26 U.S.C. §5848(a) 19

49 U.S.C. §46 (1940) (27 Stat. 443 (1893)) 18

Other Authorities:

Davis, *The Administrative Power of Investigation*, 56 Yale L.J. 1111 (1947) 3, 18

Lasson, *The History and Development of the Fourth Amendment*, c. 2 (1937) 3

Tudor, *Life of James Otis* (1823) 66 ..... 3, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-81

UNITED STATES OF AMERICA,

Petitioner,

—v.—

LOARN ANTHONY BISWELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae**

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 170,000 members solely dedicated to defending the liberties guaranteed by the Bill of Rights. One of the most vital of those civil liberties is the right of privacy premised on the Fourth Amendment and reinforced by other Amendments as well. The central question in this case is whether and in what respect that right of privacy is infringed by a congressional statute which authorizes warrantless searches of the premises of certain

* Letters of consent to the filing of this brief, from counsel for the petitioner and the respondent, have been filed with the Clerk.

classes of people. We provided counsel for the appellants in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967), and we hope that our experiences in connection with those cases will be of assistance to the Court.

I.

Introduction and summary of argument.

The issue in this case arises from the Government's attempt, relying on 18 U.S.C. Section 923(g), to avoid application of the Fourth Amendment warrant requirement to persons licensed to manufacture, sell or collect certain firearms. Its resolution turns on two related questions: (1) whether the statute authorizing warrantless administrative searches without probable cause and without any specified rules governing the procedure that inspectors must follow is consistent with the Fourth Amendment, and (2) whether evidence found during such a warrantless search may constitutionally be utilized to convict the Respondent.

If held not to require a search warrant for inspection, then the statute removes the home of the gun collector, as well as the business premises of the gun seller, from the protection of privacy guaranteed by the Fourth Amendment. The consequence, as noted by Mr. Justice Douglas, is that the right to be free from arbitrary intrusion by the government " . . . is watered down to embrace only certain invasions of one's privacy. If officials come to inspect . . . they may come without a warrant and demand entry as of right. This is a strange deletion to make from the Fourth Amendment." *Frank* v. *Maryland,* 359 U.S. 360, 375 (1959) (dissenting opinion). By permitting the warrantless entry of an

official to demand records and documents, and to inspect for firearms which may result in conviction, the statute resembles the hated Writs of Assistance which were attacked by James Otis as placing the "liberty of every man in the hands of every petty officer." Tudor, *Life of James Otis,* 66 (1823) (quoted in *Frank* v. *Maryland, supra* at 364). Such provisions helped spark the American Revolution and led directly to the passage of the Fourth Amendment. See Lasson, *The History and Development of the Fourth Amendment,* c. 2 (1937); Davis, *The Administrative Power of Investigation,* 56 Yale L.J. 1111, 1154 (1947).

The warrantless searches purportedly authorized by this statute infringe upon two discrete Fourth Amendment interests. The first is the basic intrusion into the inspectee's privacy, an interest described in *Frank* v. *Maryland, supra,* as "... . the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the State unless their entry is under proper authority of law." *Id.* at 364. The government attempts to justify this intrusion by pointing to the public interest in prompt inspection of the premises of gun dealers as outweighing the "minimal" intrusion. But warrantless searches are never preferred, particularly where, as here, several alternative methods within the framework of a warrant procedure are available to achieve the statutory objectives.

Second, and equally objectionable, the statute violates the self-protection interest of the inspectee. Information gathered during the invasion of the privacy interest can then be used, as here, to "effect a further deprivation of life or liberty or property," *Frank* v. *Maryland, supra* at 365, forfeiture of property and a conviction for possession

of improper weapons. At the very least, and assuming *arguendo* that the invasion of the privacy interest without a warrant is held necessary to effecting the statutory objectives, then the licensee's self-protection interest must be preserved intact by denying to the Government any prosecutorial fruits of its warrantless search. If the statute is allowed to sacrifice both sets of interests, then, in effect, it supplants the Fourth (and Fifth) Amendments.

II.

The warrantless inspection provisions of 18 U.S.C. Section 923(g) significantly invade the Fourth Amendment privacy interests of the class of inspectees covered by the statute; since less drastic alternatives are available to accomplish the statutory objectives (within the framework of a warrant procedure) such inspections are unconstitutional.

This is another in the series of administrative inspection cases which have come before this Court in recent years and are the inevitable concomitant of industrial development, urbanization and advancing technology. Of course, there can be no quarrel with this country's need for "effective gun control" through a licensing system, nor with the obvious need for inspection of the licensees to insure the basic statutory purpose of regulating and tracing firearms. But, as in the earlier cases, "the question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967).

A. The relevance of the *Colonnade* case.

In *Colonnade Catering Corporation* v. *United States*, 397 U.S. 72 (1970) this Court addressed itself to a similar statutory arrangement. That decision is relevant here in two respects. First, it affords the basis for deciding this case on a narrow ground. There this Court held that where Congress had chosen the alternative of making it an offense for a licensee to refuse admission to the inspector, then a warrantless, forcible entry was unauthorized by the statute and therefore improper. Similarly, here the refusal to permit an inspection would constitute a crime under 18 U.S.C. Section 924(a) and would result in revocation of the license in question under 18 U.S.C. Section 923(e) and (f), Brief of Petitioner, p. 9, n. 4. In short,

> . . . Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector. 397 U.S. at 77.

Second, while the decision referred to Congress' "broad power" to design inspection powers under the liquor laws, the Court also stated that "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Ibid.*

The Government attempts to characterize this statute as solely a "licensing scheme" directed at business enterprises, and therefore not subject to the warrant requirement. But significantly, 18 U.S.C. Section 923(g) authorizes inspections not into "businesses" but "premises" and includes the "collector" as well as the manufacturer and dealer.

Thus the private citizen at home, licensed to collect firearms as a hobby, is, under the Government's view of this case, subject to the same warrantless intrusion into his premises as the businessman, and the warrantless inspections sought to be justified sweep further than businessmen as a class.[1] In *See* v. *City of Seattle*, 387 U.S. 541 (1967), this Court held that no distinction exists between the Fourth Amendment requirements applicable to administrative searches of commercial and private premises, a search of either "is presumptively unreasonable if conducted without a warrant." Accordingly, since the statute here applies to other than commercial premises, any argument that the present situation is somehow like the commercial licensing scheme in *Colonnade*, and therefore outside the framework of the general rule in *See* v. *City of Seattle, supra*, is misplaced.

In short, the fact that private, non-commercial premises are included within the sweep of the warrantless searches here sought to be sustained requires that the case be decided under the principles of *See* and *Camara*.

---

[1] And although 923(g) authorizes *entry* only during "business hours", that section also requires licensees to make records available for inspection "at all reasonable times". No extended discussion is necessary to show the possibility for abuse when one considers applying this statute to the gun collector who keeps his collection at home. "Business hours" may be incapable of definition and "reasonable times" might be deemed to include nighttime visits. These problems necessitate that a magistrate be interposed between inspector and licensee. These problems leave, e.g., the gun collector living at home "subject to the discretion of the official in the field". This is precisely the discretion to invade private property which this Court has "consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Camara* v. *Municipal Court, supra*, 532-3 "Broad statutory safeguards are no substitute for individualized review". (*Id.*, at 533).

B. The Government has shown no necessity for the warrantless searches.

Since, under *See* and *Camara,* a warrantless search of the kind conducted here "is presumptively invalid," it is necessary to examine the Government's reasons for justifying such a procedure and to consider whether what the Government seeks to accomplish outside the warrant procedure could be accomplished within it.

The Government's first objection to the warrant requirement is that if the inspector must ask the licensee for permission to enter without a warrant and then seek a warrant only if refused, the crucial element of surprise is eliminated since "The dealer who is skirting the law would almost surely utilize the time thereby afforded to conceal any infractions" (Government Brief, p. 16). This conclusion is not disputed but the argument begins from a false premise, since there is absolutely no requirement that the inspector make this pre-warrant request. The "suggestion" in *Camara,* that "it seems likely that warrants should normally be sought only after entry is refused," 387 U.S. 523 at 539, was made only because the kinds of violations sought to be revealed could not be moved or covered up. Where firearms are concerned a request to inspect need not be a pre-condition for obtaining a warrant, and surprise can continue to play a factor, as it should, even though a warrant is obtained. Thus, the question of "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" *Camara* v. *Municipal Court, supra,* at 533 should be answered in the negative. And without the need for a demand for entry as a precondition for obtaining a warrant, the warrant require-

ment itself will in no way be "likely to frustrate the governmental purpose behind the search." *Ibid.*

The Government's other objections to the use of a warrant procedure under 18 U.S.C. 923(g) are that (1) an "automatic warrant requirement" would result . . . "even though most licensees would have no objection to inspection," causing (2) a "needless consumption of limited" enforcement manpower in turn somehow resulting in (3) "a tendency to antagonize the law abiding dealers" (Government Brief, p. 16).

The Government's speculative claim that most licensees would cheerfully submit to inspection without the necessity of a warrant surely begs the question whether the warrant should be required and disregards the interests of those who would assert their Fourth Amendment rights. If the right to demand a warrant exists, it should not be withdrawn merely because some choose not to exercise it. Indeed, it may be precisely because the licensee knows of his right to insist upon a warrant that he does not do so. The willingness of some citizens to waive certain Constitutional rights cannot be the basis for withholding those rights from all.[2]

Next, the Government claims that a warrant requirement would needlessly consume the manpower of agents in the Alcohol, Tobacco and Firearms Division. Such a contention is at odds with the doctrine consistently adopted by

---

[2] For example, as Mr. Chief Justice Burger has noted, if every felony defendant in this country exercised his right to a jury trial, the strain on judicial resources would be enormous. See *Santobello* v. *New York*, ——U.S.——, 40 USLW 4076, 4077 (1971). Yet the fact that over 90 percent of all defendants waive such rights has never been urged as a basis for doing away with the Sixth Amendment.

this Court that the warrant requirement of the Fourth Amendment

> . . . is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L. Ed.2d 564, 592 (1971).

"Expediting" the work of the particular governmental agency which sees itself as somehow hampered by the warrant requirement has never been allowed as a basis for abolishing the requirement. If it were, the claim of expediency would doubtless always win, since it "appears over and again whenever government seeks to use its compulsive force against the citizen," *Frank* v. *Maryland, supra,* at 382 (dissenting opinion), "The official's measure of his own need often does not square with the Bill of Rights". *Ibid.* The Government's argument based on inconvenience is nothing more than a claim that the warrant requirement should cease to exist because one must obtain a warrant in order to meet that requirement.[3]

Finally, the Government speculates that imposing a warrant requirement would somehow result in a "tendency to antagonize the law abiding dealers" (Government Brief,

---

[3] The Government's claimed "lack of adequate manpower" may also be the result of the IRS' own misconception that no warrants would be necessary for the inspections which it wished its agents to conduct. The better solution would be to request more agents, not to allow a budgetary mistake to serve as a basis for dispensing with the Fourth Amendment.

p. 16). It is unclear just how such antagonism would be caused since the alternative is making the same inspection request and entering without a warrant and would involve, as in this case, reading a copy of the statute (18 U.S.C. Section 923(g)) to the licensee. If anything, the Government's supposedly law abiding dealer may wonder why no warrant is presented since he will, as did Respondent in this case (as well as the inspectees in *Frank, See, Camara* and *Colonnade*) share the average citizen's reasonable expectation that a warrant is required.

C. Requiring a warrant would significantly advance privacy interests.

In seeking to avoid the Fourth Amendment warrant requirements, the Government has also urged that a warrant requirement for inspections pursuant to 18 U.S.C. 923(g) does nothing to protect the privacy interest of the licensee since "the Magistrate asked to issue a warrant authorizing inspection of a gun dealer's premises could do no more than is presently done by statute" (Government's Brief, p. 15). There are several respects in which this argument is incorrect.

First, although some restrictions are imposed by statute governing the time of day when a particular inspection may occur, there is no guarantee that the agent will not resort to frequent, or daily inspections, for harassment purposes, nor is there any evidentiary check on whether this has in fact occurred, such as would be guaranteed under a warrant procedure. And, presumably the Magistrate himself might question the reasonableness of the need for issuance of daily warrants.

The warrant procedure would also provide a means for recording the basis for the inspector's belief that the prem-

ises to be inspected were in fact those of someone licensed under 18 U.S.C. 923 and would protect, for example, against the pretext search, on the claim of "mistaken judgment by the inspector, of the premises of one whose license had expired and who no longer sold, manufactured or collected firearms. Requiring the inspector to reduce to writing the basis for even the simple claim that the person whose premises to be inspected is in fact presently licensed would eliminate such a possibility.

Next, a precise description of the premises to be searched would be recorded in the affidavit supporting the warrant, thus protecting the licensee (and neighbors or tenants) from an over-broad search of adjacent premises, and protecting the inspector from possible civil liability against claims of exceeding his authority in conducting an over-broad search.

Furthermore, since *entry* is authorized only during "business hours," and since there is no time of day when the premises of the private collector are open to the public, adding a magistrate to the decision-making process of how to interpret "business hours" in this situation would do much to eliminate potential misunderstanding between the inspector and the private gun collector licensee. Similarly, Section 923(g) also requires that all licensees "shall make such records available for *inspection* at all *reasonable* times, . . . " (emphasis added). Thus, what is a reasonable, non-business hour is a relevant question which a magistrate may better decide than an inspector. Additionally, because there is no specific authority for entry under this clause but only the requirement that the records be "made available" at reasonable, non-business, hours, the magistrate's warrant would presumably spell out the details of what the inspector

may and may not do by way of requiring that records be "made available" and go far to settle on the scene disputes between inspector and licensee about how to interpret this statutory language.

Finally, refusal to make such records available on demand at a reasonable time is punishable as a felony (18 U.S.C. 924). Assuming, for example, that the inspector demands that a collector produce such records at midnight under the claim that the licensee was not found at home during the daylight hours, the licensee's refusal to permit this late-night inspection thus becomes a felony on the decision of the inspector. Thus, the agent is given the unfettered discretion to turn an unreasonable late-hour inspection demand into the threat to the licensee of a felony prosecution and is empowered either to overwhelm the licensee with fear or arrest him for refusal to produce records. This is precisely the kind of situation which the Fourth Amendment sought to avoid:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. *It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime .... Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. *Frank* v. *Maryland, supra* at 380 (dissenting opinion) (emphasis added).

The foregoing situation obviously places not only the privacy, but also the "*liberty* of every man in the hands of every petty officer," *Frank* v. *Maryland, supra,* at 364, citing Tudor, *Life of James Otis* (1823), 66 (emphasis added). It should not and need not be condoned by this Court. The statutory purposes can and should be accomplished only within the framework of a warrant requirement.

III.

Assuming *arguendo* this Court interprets 18 U.S.C. Section 923(g) to authorize warrantless administrative searches and agrees to sanction invasion of the licensee's privacy interest, *amicus* urges that the licensee's self-protection interest, guaranteed under the Fourth and Fifth Amendments, must be preserved. Evidence found during such an inspection should not be admissible for any purpose; indeed, the theory in permitting warrantless administrative inspections has as its premise that nothing found during the search can be used to incriminate the inspectee.

Since evidence seized during the administrative inspection in this case was used to convict Respondent, it is obvious that, apart from the privacy interest problems discussed in Part II, *supra,* Respondent's interest in self-protection, guaranteed under the Fourth and Fifth Amendments[4] has been invaded without a warrant.

---

[4] There is some dispute as to whether the self-protection interest is grounded in the inter-relationship of the Fourth and Fifth Amendments, as this Court first suggested in *Boyd* v. *United States,* 116 U.S. 616 (1886) and as later urged by Mr. Justice Frankfurter in *Frank* v. *Maryland, supra,* at 365, or grows out of the First, Fourth and Fifth Amendments which were believed to be "indeed

In distinguishing between privacy and self-protection, Mr. Justice Frankfurter also showed their interrelationship in the area of administrative searches and suggested that warrantless intrusion into the privacy interest is only permissible, if ever, on the condition that no attempt will be made to invade the self-protection interest:

> Since the inspector does not ask that the property owner open his doors to a search for "evidence of criminal action" which may be used to secure the owner's criminal conviction, historic interests of "self-protection" jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense right to be secure from intrusion into personal privacy. *Camara* v. *Municipal Court, supra,* at 530.

Put another way, the privacy interest invaded under administrative inspection and licensing programs has, as in *Frank,* been balanced against the need for the inspection and, on balance, attenuated, but only on the pre-condition that as more and more of the privacy interest is surrendered, the self-protection interest is further shielded and preserved. "Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, . . . " was acceptable, *Frank* v. *Maryland, supra* at 367,

---

closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience, human dignity and freedom as well' ", as suggested in the concurring opinion of Mr. Justice Douglas in *Frank* v. *Maryland, supra,* at 376, citing *Ullman* v. *U. S.,* 350 U.S. 422 (dissent) and *Feldman* v. *U. S.,* 322 U.S. 487 (dissent). Whatever the precise basis for the self-protection interest, it has been consistently recognized as separate and distinct from that of privacy. *Camara* v. *Municipal Court, supra,* at 530-532.

the privacy interest could be invaded, but only on condition that self-protection would be insured. In short, what is taken away from privacy is given to self-protection.[5]

Thus, there is a workable model for reconciling the various inspections and licensing programs which come before this Court, namely, the theory, suggested in *Frank*, that even where the needs of a particular administrative agency are found to justify an intrusion into the Fourth Amendment privacy interest, no evidence seen or obtained during the inspection should be admissible against the inspectee's self-protection interest. Unless this model is adopted, and self-protection is safeguarded under an *a priori* exclusionary rule, the legitimate needs for development of various administrative inspections will surely be outstripped by the abuse of "pretext" administrative searches to do police

---

[5] The dissent in *Frank*, stating what later became the majority view in *Camara* v. *Municipal Court, supra,* and *See* v. *City of Seattle, supra,* agreed with the privacy/self-protection distinction but objected to the *Frank* majority's view that the privacy interest was of less significance than the self-protection. In the *Frank* dissent, Mr. Justice Douglas also disputed the majority's factual assertion that the administrative inspection involved did not lay the groundwork for criminal prosecution (at p. 375) and, believing that attenuating the privacy interest necessarily attenuated the self-protection interest, objected to dispensing with the warrant requirement (at 375). This, of course, became the majority's reason for overruling *Frank* in *Camara* v. *Municipal Court, supra,* where privacy and self-protection were given equal weight. And although the companion case of *See* v. *City of Seattle, supra,* reserved decision on the problems of "licensing programs", such as presented in the present case, stating that they would be resolved "on a case-by-case basis under the general Fourth Amendment standard of reasonableness" (at 546), this "case-by-case" resolution seems applicable only to the privacy interest issue. Presumably a licensing, as distinguished from an administrative inspection program, may justify greater invasions of the privacy interest; no license, however, should be conditioned upon the mandatory waiver of one's self-protection interest under *Frost* v. *Railroad Commission,* 271 U.S. 583 (1926) or (by implication) *Haynes* v. *United States,* 390 U.S. 85 (1968).

work. New and broadly worded administrative programs designed to do indirectly what the police must now obtain a warrant to accomplish, will also undoubtedly develop;

> History shows that all officers tend to be officious; and . . . inspectors, making out a case for criminal prosecution of the citizen, are no exception, *Frank* v. *Maryland, supra,* at 382 (dissenting opinion).

As Justice Douglas has observed, any doctrine permitting warrantless administrative and licensing inspections, which does not also safeguard the self-protection interest, invites, ". . . a facile search, theoretically for things connected with . . ." the condition which the inspector seeks to correct but which will in fact be used to ". . . turn up evidence of crime," a possibility which will be well known to administrative inspectors and police alike, *Abel* v. *United States,* 362 U.S. 217, 253-4 (1960) (dissenting opinion).

Such a model should be unobjectionable to the Government since it has only urged that the warrantless intrusion was necessary to further the needs of a particular administrative agency in regulating a certain condition, i.e., the licensing of guns in the present case or the correction of unsanitary health conditions in *Frank, Camara* and *See.* It has never been urged that the warrantless inspection was necessary or justifiable to search for evidence of crime. Any further objection by the Government at this point necessarily undercuts the strength of its claim that the need for the inspection is to be balanced "merely" against the privacy interest involved.

It might be argued that once "on the premises" the inspector cannot be asked to shut his eyes to evidence of a crime found in "plain view." However, this argument

misses the point that the inspector is permitted warrantless entry on the strict pre-condition that nothing he finds during the inspection can be used to incriminate the inspectee. Once the inspector is on the premises and sees evidence of a crime, he cannot break the promise which gained him entry; when he suddenly shifts his role, under the claim of "plain view" and seizes evidence for incriminatory purposes, he breaks, so to speak, the very promise which he was required to make before gaining that view.

The remaining problem presented by this model is whether the inspector may seize illegal evidence, not for prosecutorial purposes, but for forfeiture. Such a seizure would appear permissible since it is only the later attempt to use what is seized as evidence to arrest and prosecute the inspectee which violates the self-protection interest. No one would urge, for example, that a health inspector must ignore a ticking explosive device found inside a building. Presumably, even without a warrant requirement, the inability of gaining convictions, combined with the still-existing requirement that warrantless administrative inspections be reasonable would combine to discourage wholesale use of pretext administrative searches aimed only at "contraband collection" by the authorities. This view is admittedly based on a narrow interpretation of self-protection and considers only the "deprivation of liberty," as distinguished from the "deprivation of property" considerations involved. A broader interpretation of the self-protection interest would perhaps require inspectors to remedy immediately dangerous conditions such as the explosive device in the above example but to leave contraband where they find it. Unless one of these two alternatives is adopted, the threat to self-protection becomes so

great as to make unacceptable the warrantless privacy intrusion.

Support for the model suggested can be found in legislative precedent safeguarding the self-protection, as distinguished from the privacy, interest of the citizen. Thus, as early as 1893, the Interstate Commerce Act was amended by the Compulsory Testimony Act to provide that no person would be excused on the grounds of self-incrimination from giving evidence in obedience to a subpoena from the Commission, but that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may . . . produce evidence . . . in obedience to its subpoena." 27 Stat. 443 (1893), 49 U.S.C. §46 (1940).

This legislation was a response to the dictum of *Boyd* v. *United States,* 116 U.S. 616 (1886) which extended the "privacy interest" protection of the Fourth Amendment to ". . . any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods . . . " (at 630).[6] Enactment of such legislation has been described by one writer as a route of "escaping the effects of the *Boyd* dictum." Davis, *The Administrative Power of Investigation, supra,* at 1128. Thus, Congress recognized and safeguarded the citizen's self-protection against compulsory self-incrimination but at the same time permitted the needs of various administrative agencies to outweigh what was

[6] Sometime later, the Fourth Amendment privacy interest issue raised by *Boyd* was eliminated by this Court's ruling in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 195 (1946) that the administrative subpoena *duces tecum* involved "no question of actual search and seizure." (See also 327 U.S. 186 at 202.)

then recognized as the citizen's privacy interest in papers which he might be subpoenaed to produce.

More recently, in *Haynes v. United States,* 390 U.S. 85 (1968), this Court recognized the threat to self-protection created under the licensing provision of the National Firearms Act and held unconstitutional those portions of the Act requiring the self-incrimination. This in turn led to the 1968 Congressional Amendment to the National Firearms Act, 26 U.S.C. 5848(a), that "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provisions of this chapter or regulations issued thereunder, shall . . . be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application, . . . containing the information or evidence."

The same result should occur under any administrative inspection program which has the potential for threatening a citizen's "self-protection" interest and any incursion into the privacy interests of the Fourth Amendment should not be permitted except under a holding which safeguards the self-protection interest.

Until the Congress enacts similar legislation safeguarding the self-protection interest threatened in the present case, this Court should hold unconstitutional the inspection provisions of 18 U.S.C. 923(g) and refuse to adopt a theory of administrative inspections which would permit convictions based on evidence found during such inspections. Assuming, *arguendo,* the licensee's privacy interest against warrantless inspections under 18 U.S.C. 923(g) is "out-

weighed" by the administrative needs involved, none of the demands of that administrative agency can ever justify elimination of the licensee's interest in self-protection.

IV.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

JOHN S. EDMUNDS
American Civil Liberties Union
of Hawaii
Suite 908, Castle & Cooke Bldg.
Financial Plaza
Honolulu, Hawaii 96813

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Attorneys for Amicus Curiae

March, 1972

UNITED STATES *v.* BISWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 71–81. Argued March 28, 1972—Decided May 15, 1972

Warrantless search of locked storeroom during business hours as part of inspection procedure authorized by § 923 (g) of the Gun Control Act of 1968, which resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons *held* not violative of Fourth Amendment. Pp. 311–317.

442 F. 2d 1189, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 317. DOUGLAS, J., filed a dissenting opinion, *post*, p. 317.

R. Kent Greenawalt argued the cause for the United States. On the brief were *Solicitor General Griswold*, *Assistant Attorney General Petersen*, *Jerome M. Feit*, *Beatrice Rosenberg*, and *Kirby W. Patterson*.

Warren F. Reynolds argued the cause and filed a brief for respondent.

John S. Edmunds and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Gun Control Act of 1968, 82 Stat. 1213, 18 U. S. C. § 921 *et seq.*, authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at

such premises." [1] 18 U. S. C. § 923 (g). Respondent, a pawn shop operator who was federally licensed to deal in sporting weapons, was visited one afternoon by a city policeman and a Federal Treasury agent who identified himself, inspected respondent's books, and requested entry into a locked gun storeroom. Respondent asked whether the agent had a search warrant, and the investigator told him that he did not, but that § 923 (g) authorized such inspections. Respondent was given a copy of the section to read and he replied, "Well, that's what it says so I guess it's okay." Respondent unlocked the storeroom, and the agent found and seized two sawed-off rifles which respondent was not licensed to possess. He was indicted and convicted for dealing in firearms with-

[1] "Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary [of the Treasury] may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition." 18 U. S. C. § 923 (g).

out having paid the required special occupational tax.[2] The Court of Appeals reversed, however, holding that § 923 (g) was unconstitutional under the Fourth Amendment because it authorized warrantless searches of business premises and that respondent's ostensible consent to the search was invalid under *Bumper* v. *North Carolina*, 391 U. S. 543 (1968). The Court of Appeals concluded that the sawed-off rifles, having been illegally seized, were inadmissible in evidence. 442 F. 2d 1189 (CA10 1971). We granted certiorari, 404 U. S. 983 (1971), and now reverse the judgment of the Court of Appeals.

As the Court of Appeals correctly recognized, we had no occasion in *See* v. *City of Seattle*, 387 U. S. 541 (1967), to consider the reach of the Fourth Amendment with respect to various federal regulatory statutes. In *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), we dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. There, federal inspectors, without a warrant

[2] Respondent was licensed under 18 U. S. C. § 923 to sell certain sporting weapons as defined in 18 U. S. C. § 921. The sawed-off rifles, however, fell under 26 U. S. C. § 5845's technical definition of "firearms," and every dealer in such firearms was required by 26 U. S. C. § 5801 to pay a special occupational tax of $200 a year. Such firearms are also required to be registered to a dealer in the National Firearms Registration and Transfer Record. 26 U. S. C. § 5841. Respondent was indicted on six counts. Count I, on which he was convicted, charged that he had "wilfully and knowingly engaged in business as a dealer in firearms, as defined by 26 U. S. C. 5845 . . . without having paid the special (occupational) tax required by 26 U. S. C. 5801 for his business." Counts II–V, on which he was acquitted, charged that he had possessed certain firearms that were not identified by serial number, as required by 26 U. S. C. § 5842, and that were not registered in the National Firearms Registration and Transfer Record, as required by 26 U. S. C. § 5841. Count VI, which charged respondent with failing to maintain properly the records required under 18 U. S. C. § 923, was severed and is awaiting trial.

and without the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. Emphasizing the historically broad authority of the Government to regulate the liquor industry and the approval of similar inspection laws of this kind in *Boyd* v. *United States*, 116 U. S. 616 (1886),[3] we concluded that Congress had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U. S., at 76. We found, however, that Congress had not expressly provided for forcible entry in the absence of a warrant and had instead given Government agents a remedy by making it a criminal offense to refuse admission to the inspectors under 26 U. S. C. § 7342.

Here, the search was not accompanied by any unauthorized force, and if the target of the inspection had been a federally licensed liquor dealer, it is clear under *Colonnade* that the Fourth Amendment would not bar a seizure of illicit liquor. When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on

[3] "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. . . . [I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment." 116 U. S., at 623–624 (footnote omitted).

notice as to their identity and the legal basis for their action. Respondent's submission to *lawful* authority and his decision to step aside and permit the inspection rather than face a criminal prosecution [4] is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. In this context, *Bumper* v. *North Carolina*, 391 U. S. 543 (1968), is inapposite, since there the police relied on a warrant that was never shown to be valid; because their demand for entry was not pursuant to lawful authority, the acquiescence of the householder was held an involuntary consent. In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

We think a like result is required in the present case, which involves a similar inspection system aimed at federally licensed dealers in firearms. Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. See Congressional Findings and Declaration, Note preceding 18 U. S. C. § 922. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in

[4] Congress has made it a crime to violate any provision of the Gun Control Act. 18 U. S. C. § 924.

a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.

It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In *See* v. *City of Seattle*, 387 U. S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U. S. C. § 921 (a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute. The seizure of respondent's sawed-off rifles was not unreasonable under the Fourth Amendment, and the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

Had I been a member of the Court when *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), was decided, I would have joined the respective dissenting opinions of Mr. Justice Black and of THE CHIEF JUSTICE, 397 U. S., at 79 and 77. I therefore concur in the result here.

MR. JUSTICE DOUGLAS, dissenting.

As Mr. Justice Clark, writing for the three-judge panel in the Court of Appeals for the Tenth Circuit said, the Federal Gun Control Act, 18 U. S. C. § 923 (g), has a provision for inspection that is "almost identical" with the one in *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72.

The present one provides:

> "The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . ." 18 U. S. C. § 923 (g).

The one in *Colonnade* provided:

> "The Secretary or his delegate may enter during business hours the premises . . . of any dealer for the purpose of inspecting or examining any records or other documents required to be kept . . . under this chapter . . . ." 26 U. S. C. § 5146 (b).

The Court legitimates this inspection scheme because of its belief that, had respondent been a dealer in liquor instead of firearms, such a search as was here undertaken would have been valid under the principles of *Colonnade*. I respectfully disagree. *Colonnade*, of course, rested heavily on the unique historical origins of governmental regulation of liquor. And the Court admits that similar regulation of the firearms traffic "is not as deeply rooted in history as is governmental control of the liquor industry." Yet, assuming, *arguendo*, that the firearms industry is as appropriate a subject of pervasive governmental inspection as is the liquor industry, the Court errs.

In *Colonnade*, we agreed that "'Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand.'" 397 U. S., at 76. But we also said:

> "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id.*, at 77.

Here, the statute authorizing inspection is virtually identical to the one we considered in *Colonnade*. The conclusion necessarily follows that Congress, as in *Colonnade*, has here "selected a standard that does not include forcible entries without a warrant." *Ibid.*

In my view, a search conducted over the objection of the owner of the premises sought to be searched is "forcible," whether or not violent means are used to effect

the search. In this case, the owner withdrew his objection upon being shown a copy of the statute authorizing inspection, saying: "If that is the law, I guess it is all right." If we apply the test of "consent" that we used in *Bumper* v. *North Carolina*, 391 U. S. 543, we would affirm this judgment,* for as MR. JUSTICE STEWART, speaking for the Court in *Bumper*, said:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.*, at 548–550.

I would affirm the judgment below.

---

*The majority concludes that *Bumper* is "inapposite" to this case. *Bumper* holds that an *otherwise invalid* search is not legitimated because of the occupant's consent to a law enforcement officer's assertion of authority. *Bumper* is only "inapposite" if one has already concluded that consent is irrelevant to the validity of the search at issue.